88-1284

Supreme Court, U.S.
FILED
JAN 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CARPENTERS LOCAL 608, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Petitioner,

– against –

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRA A. STURM, ESQ.
MANNING, RAAB, DEALY & STURM
Attorney for Petitioner
440 Park Avenue South
New York, New York 10016
(212) 683-6699

QUESTIONS PRESENTED

1. Can a party be held in Civil Contempt for failing to obey an ambiguous order?
2. Did the Second Circuit Court of Appeals ere in modifying its earlier Order and condition finding Petitioner in Civil Contempt of the original Order unless the Petitioner acted in accord with the Court's modified Order.
3. Did the Second Circuit Court of Appeals ere when it found Petitioner in Civil Contempt on hearsay grounds, without first giving Petitioner an opportunity to a factual hearing as to the basis for the alleged contempt.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Carpenters Local 608, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and the National Labor Relations Board.

The Petitioner is an unincorporated association which is affiliated with the United Brotherhood of Carpenters & Joiners of America, an international labor organization. As an affiliate of the International Union, Petitioner, is also affiliated with the AFL-CIO.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

POINT I
THE ORDERS OF THE CIRCUIT COURT ARE AMBIGUOUS 17

POINT II
THE SECOND CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO WARRANT THIS COURT THIS COURT'S EXERCISE OF ITS SUPERVISORY POWERS. 25

POINT III
IMPORTANT FEDERAL PROCEDURAL
ISSUES EXIST 31

CONCLUSION 34

APPENDIX 35

TABLE OF AUTHORITIES

California Artificial Stone Paving Co. v. Molitor, 113 U.S. 609, 618 (1885) . . 18

Carter v. Stanton, 405 U.S. 669, 671-672 (1972) 27

EEOC v. Local 308, ...Local 28 Sheet Metal Workers, 753 F.2d 1172, 1184 (2nd. Cir. 1985). 31

EEOC v. Local 308 31

Ferrell v. Pierce, 785 F.2d 1372 (7th Cir. 1986) 19, 29

Florida Steel Corp. v. NLRB, 648 F.2d. at 240-241 31

Florida v. Rodriguez, 469 U.S. 1, 7 (1984) 33

Folsom v. Blum, 554 F. Supp. 828 (S.D.N.Y. 1982) 29

Groppi v. Leslie, 404 U.S. 505 . . 28, 30

I.C.C. v. Chicago R.I. & P.I., 218 U.S. 88, 102 (1909) 27

In re Attorney General of U.S., 596 F.2d 58 (2d. Cir. 1979), cert. denied sub nom., ... 18

In re Baum, 606 F.2d. 592 (5th Cir. 1979) 19

In re Chaplain, 621 F.2d. 1272 (4th Cir. 1980) 30

In re Weiss, 703 F.2d 653 (2d. Cir. 1983) 29

International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n, 389 U.S. 64 (1967) 19, 28

International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 75-76, (1967) . . . . . *, *

J.I. Case Co. v. NLRB, 321 U.S. 332, 341 (1944) 23

MacCorp. of America v. Williams Patent Crusher, 767 F.2d 882, 885 (Fed. Cir. 1985) 19

Marshall v. Local Union 639, International Brotherhood of Teamsters, 593 F.2d. 1297, 1303 (D.C. Cir. 1979). 19

New Jersey v. New York City, 296 U.S. 259 (1935) 25

NLRB v. FMG Indus., 820 F.2d. 189 (9th Cir. 1987) 29

NLRB v. Gentzler Tool & Die, 126 L.R.R.M. (BNA) 3318 (6th Cir. 1987) 29

NLRB v. Kingwood Mining Co., 404 F.2d.348 (4th Cir. 1968). 22

NLRB v. Laborers Fund Corp., 124 L.R.R.M. 2078 (9th Cir. 1986) 29

NLRB v. Main Caterers, Inc., 654 F.2d 131 (1st Cir. 1981) 29

NLRB v. Prince Macaroni Mfg. Co., 329 F.2d 803 (1st Cir. 1964) 22

NLRB v. Simplex Time Recorder Co., 401 F.2d 547, 549 (1st Cir. 1968) 22

NLRB v. United Wire & Supply Corporation, 312 F.2d. 11, 13 (1st Cir. 1962) . . . 24

Powell v. Ward, 643 F.2d. 924 (2nd Cir.), cert. denied, 454 U.S. 832 (1981) 19, 29

Reed v. Rhodes, 635 F.2d 556 (6th Cir. 1980) 29

Socialist Workers Party v. Attorney General of U.S., 444 U.S. 903, (1979) 18

Southwestern Bell Tel. Co. v. N.L.R.B., 116 L.R.R.M. 2211 (BNA) (5th Cir. 1984) 29

St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 75, 78 (1935) . . 27

Swift v. Blum, 502 F. Supp. 1140 (S.D.N.Y. 1980) 29

U.S. v. Sacher 31

UFI Razor Blades, Inc. v. District 65, Wholesale, Retail, Office and Processing Union, 620 F.2d 1018 (2d. Cir. 1979). 18

United States ex rel. IRS v. Norton, 717 F.2d 767, 774 (3rd Cir. 1983) 19

United States v. American Soc'y of Civil Eng'rs, 446 F.Supp. 803 (S.D.N.Y. 1977) 29

United States v. Sacher, 182 F.2d. 416 30

United States v. Sacher, 182 F.2d. 416, 418 (2nd. Cir. 1950), aff'd, 343 U.S. 1 (1952) 28

Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 889 (9th Cir. 1982) 29

OPINIONS BELOW

The final order finding the Union to be in summary contempt and earlier interlocutory orders of the Court of Appeals for the Second Circuit, Docket No. 86-4107, are not reported. Same are included in the Appendix.

The underlying decision of the Court of Appeals for the Second Circuit is reported at 811 F.2d 149 (2d. Cir. 1987), and is included in the Appendix. The Supreme Court denied certiorari (108 S.Ct. 72 (1987).

The opinion of the National Labor Relations Board below is reported at 279 NLRB No. 99. This Order adopted the findings, but modified the decision of the Board's Administrative Law Judge. Both opinions are found in the Appendix.

JURISDICTION

The Court of Appeals Order is dated October 31, 1988.

The statutory provision believed to confer jurisdiction on this Court to review the Order in question is 28 U.S.C.A. Section 1254(1) (West 1987).

STATUTES INVOLVED

The National Labor Relations Act (the "Act"), Section 8(b)(1)(A), 29 U.S.C.A. Section 158(b)(1)(A) (West 1979) imposes a duty of fair representation.

The Act, Sections 10(e) and (f), 29 U.S.C.A. Section 160 (e) and (f) (West 1979), provide for enforcement, modification or the setting aside of orders of the National Labor Relations Board by the United States Court of Appeal.

Title 18 Section 401(3) of the United States Code (18 U.S.C.A. Section 401 (3) (West 1986)) sets forth the power of the Courts of the United States to punish parties found to be in contempt for disobedience of an order or command of the Court.

STATEMENT OF THE CASE

John Harte, Franklin McMurray and Eugene Clarke are all members of the Petitioner, Carpenters Local 608, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, (the "Union"). Each of these individuals perceived himself as being the victim of discriminatory treatment in connection with the operation of the Union's hiring hall. The three individuals made requests for copies of certain materials relating to the hiring hall to be turned over to them so that they could investigate their perceived discriminatory treatment.[1]

Upon the Union's declining to make the information available, a complaint was issued by the Regional Director of Region 2 of the National Labor Relations

---

[1] The NLRB after investigating the perceived discriminatory treatment allegations found no evidence to support these perceptions.

Board (the "Board") alleging that it was a violation of Section 8(b)(1)(A) of the National Labor Relations Act (29 U.S.C.A. Section 158(b)(1)(A) (West 1979) (the "Act")) for the Union to fail to provide the individuals with the requested information.

After a lengthy and heated hearing before an Administrative Law Judge of the Board and after the Union having excepted to the recommended order of the Administrative Law Judge, the Board concluded that the Union was wrong in not providing the requested information. The Board directed the Union to cease and desist from:

> "(a) Denying employees whom it represents in collective bargaining the right to review, inspect, photocopy, or duplicate all hiring hall records (on payment of reasonable costs), or refusing to provide such employees information, on request, with regard to the

operation of its hiring hall, where such information or request is related to an alleged failure to properly refer such employees because said employees engaged in intraunion political activities or other protected concerted activities.

"(b) Arbitrarily denying employees whom it represents in collective bargaining the right to review, inspect, photocopy, or duplicate all hiring hall records (on payment of reasonable costs), or refusing to provide such employees information, on request, with regard to the operation of its hiring hall where such information or request is related to an alleged failure to properly refer such employees." (emphasis added).

The Union was affirmatively directed to:

"(a) Honor requests by Eugene Clarke, Franklin McMurray, and John Harte to inspect, review, photocopy, or duplicate all hiring hall records (on payment of reasonable costs), and provide such

> employees information on request with regard to the operation of its hiring hall, were such requests are related to the alleged failure to properly refer such employees, including but not limited to those requests made by letter in February 1983." (emphasis added).

The Board subsequently petitioned the United States Court of Appeals for the Second Circuit for enforcement of its Order. The Court accepted jurisdiction under Section 10(e) of the Act (29 U.S.C.A. Section 160(e)(West 1979)) and on February 10, 1987 the Court enforced the Board's Order in its entirety and without modification (811 F.2d. 149).

The Union petitioned for rehearing before the Court of Appeals; the petition was denied March 4, 1987.

The Union thereafter filed with the Supreme Court a Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit on the

question of whether the remedy was overly broad in that same required disclosure of confidential information protected from disclosure under the Labor Management Reporting & Disclosure Act of 1959 (29 U.S.C.A. Sections 401-531)(West 1985).

The Supreme Court denied the Petition on October 5, 1987 (108 S.Ct. 72).

As a result of the exhaustion of the appellate procedure, the Union commenced performing its obligations under the Order. A notice to members was posted at the Union's offices for sixty days. The Union thereafter advised the three individuals that the materials requested would be provided upon payment of "reasonable costs." The Union set these costs at the hourly wage and benefit level for a carpenter employee, plus 15 cents per copy, for all time spent in connection with processing

requests for reviewing, inspecting, photocopying or duplicating hiring hall inquiries. The above formula did not represent the actual costs to the Union which were substantially higher.

The Office of the General Counsel of the Board, now acting on behalf of the Board, took the position that the Union could not charge for the materials requested and threatened the Union that it would be brought up on contempt charges if the Union did not cease and desist from demanding payment for the materials in the aforedescribed manner. The Board threatened that no cost could be charged in connection with a request to "inspect" hiring hall records. This was in direct conflict with the wording of the Order which specifically provided imposition of costs for requests to inspect.

In order to avoid a Contempt

proceeding, on or about December 24, 1987, the Union moved before the Second Circuit Court of Appeals for an Order of Clarification as to its obligations under the Order vis a vis the Union's right to be paid "reasonable costs" in connection with requests "to inspect, review, photocopy or duplicate" hiring hall records.

Although the Board orally advised that such a motion would be a valid method for resolving the dispute between the parties, the Board in its response to the Motion, argued that the Order should not be clarified, because of the Board's perception that the Union was only engaged in a frivolous attempt to delay compliance with the Court's order of February 10, 1987.

The Court, by Order dated February 11, 1988, simply denied the Union's application. Thus, the Union was again

left with no guidance as to the meaning of the term "reasonable costs" for requests "to inspect, review, photocopy or duplicate" hiring hall records.[2]

Upon the denial of the application, the Board by letter dated February 25, 1988 admonished the Union that the denial by the Court, effectively modified the Court's previous order so that the Union could charge "only for reasonable costs actually incurred in the photocopying and duplicating of hiring hall records." (emphasis added). The Board threatened that no costs, reasonable or otherwise could be assessed for "review or inspection" of material, but only for "photocopies." The Board upon hearsay, accused the Union of acting in bad faith without even having given the Union an opportunity to present its

---

[2] The Court likewise denied the Union's request for a rehearing.

evidence in connection with an alleged visit by Harte, one of the three complaining individuals, to the Union's office.

On or about June 14, 1988 the Board, through the Office of its General Counsel, filed a Notice of Motion for a Summary Order Adjudicating the Union to be in Civil Contempt of the Court's February 10, 1987 Order, based upon the Union's purported failure to provide Harte with the material he requested.

The Union in its answer denied the substantive allegations and the hearsay facts relied upon by the Board. The Union further advised the Circuit Court that the Board failed to comply with Local Rule 27(a)(2), which requires affidavits and memoranda of law in support of applications of this nature.

Without affording the Union an opportunity for a hearing on the Board's

motion, on August 18, 1988 the Circuit Court issued an interlocutory order which order effectively modified the Court's prior order of February 10, 1987 to the extent that the Union was now advised that it could not impose reasonable costs for reviewing, inspecting or duplicating materials. The Court ordered:

> "that unless Respondent provides the Court with evidence showing that the requested information has been made available at no cost other than the reasonable cost of photocopying, the motion [for an order summarily adjudicating the Union in civil contempt] shall be granted after 30 days from the date of this order." (emphasis added).

The Union thereupon advised Harte that all materials would be made available to him upon payment of 15 cents per copy. A copy of this letter was sent to the Court. The Board, in a hearsay

statement to the Court thereafter misled the Court into believing that the Union again refused to provide the material. In actuality, the Union refused to turn over the materials, because Harte refused to tender the 15 cents per copy cost, which figure the parties previously acknowledged was not unreasonable. Without affording the Union a hearing and without explanation, on October 31, 1988 an Order was entered by the Second Circuit summarily finding the Union to be in contempt in its failure to comply with the Court's Judgment of February 10, 1987 and its Order of August 18, 1988.

The Order of the Court as issued, is punitive in nature and not designed as a coercive attempt to force the Union to remedy any perceived failure on its part. In this regard, the Union has been required to duplicate and mail to each one of its members a copy of the Court's

order and the Board's notice to members. This is purely a punitive action and acknowledged as such by the Board.

The Court's order is further inconsistent and contradictory in of itself. The contempt adjudication directs the Union to fully obey and comply with the Court's February 10, 1987 order. This order calls for the Union to, inter alia, honor the 1983 request of Harte "to inspect, review, photocopy or duplicate all hiring hall records (on payment of reasonable costs)." While at the same time, the Union is ordered to:

> "Immediately provide John Harte with the hiring hall information requested in February 1983 at no cost other than the reasonable cost of photocopying."

The two provisions in the respective orders are inconsistent and incapable of being performed. The inconsistencies fail to put the Union on

notice as to exactly what action on its part will allow it to conduct its business without further threats of contempt motions by the Board.

REASONS FOR GRANTING THE WRIT

POINT I

THE ORDERS OF THE CIRCUIT COURT ARE AMBIGUOUS

The power of contempt has been viewed as an extremely potent weapon. As such, its powers must not lightly be invoked. In re Attorney General of U.S., 596 F.2d 58 (2d. Cir. 1979), cert. denied sub nom., Socialist Workers Party v. Attorney General of U.S., 444 U.S. 903, (1979); UFI Razor Blades, Inc. v. District 65, Wholesale, Retail, Office and Processing Union, 620 F.2d 1018 (2d. Cir. 1979).

As an extreme remedy, civil contempt should not be resorted to where there is fair ground of doubt as to the wrongfulness of a party's conduct. California Artificial Stone Paving Co. v. Molitor, 113 U.S. 609, 618 (1885); see

also MacCorp. of America v. Williams Patent Crusher, 767 F.2d 882, 885 (Fed. Cir. 1985). Prior to a party being held in civil contempt, it must be given fair warning that certain acts are forbidden. "Any ambiguity in the law should be resolved in favor of the party charged with contempt." United States ex rel. IRS v. Norton, 717 F.2d 767, 774 (3rd Cir. 1983). The power to find a party in contempt may be exercised only if the order is clear and unambiguous. Powell v. Ward, 643 F.2d. 924 (2nd Cir.), cert. denied, 454 U.S. 832 (1981); International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 75-76, (1967); Marshall v. Local Union 639, International Brotherhood of Teamsters, 593 F.2d. 1297, 1303 (D.C. Cir. 1979); In re Baum, 606 F.2d. 592 (5th Cir. 1979); Ferrell v. Pierce, 785 F.2d. 1372 (7th Cir. 1986).

Analyzing the sequence of events at hand, leads one to believe that two separate arms of the government have joined together to punish a union, merely because it exercised its rights to challenge a point of law at each step of the statutory scheme. The Union fought the underlying unfair labor practice at each phase as it progressed through the system. As a punishment for exercising its rights, the Union has now been railroaded by the Second Circuit through a process that has no rules.

The term "reasonable men may differ" highlights the difficulty posed in connection with compliance by the Union with the Court's Order. One should not be accused of contempt based upon an order which by definition has no fixed ascertainable standard of compliance. Who is to say that a jury of peers would conclude that the Union's proposal was

not a reasonable accommodation. When a governmental agency threatens contempt proceedings with prospective fines and bodily attachments and the enforcing Court ignores a party's right to a hearing[3], we have just the situation admonished by the First Circuit when it refused to find a respondent in contempt. As the Circuit so aptly stated:

> The Board now tells us that we were duly apprehensive; that we, and the employer should count on it not to be unreasonable in citing a person for contempt. Assuming the order is in fact nebulous, this argument means that the Board asks for despotic powers on the grounds that

---

[3] The standard of proof in civil contempt is one of clear and convincing evidence. Powell v. Ward, 643 F.2d. 924. Absent a hearing, it is impossible to conclude that there was proof sufficient to meet this test. The Union was tried and convicted on the hearsay allegations of an employee of the N.L.R.B.

> it is benevolent. This is not the principle; a party, and the Court as well, must be able to rely on the order itself.

NLRB v. Simplex Time Recorder Co., 401 F.2d 547, 549 (1st Cir. 1968). Accord NLRB v. Kingwood Mining Co., 404 F.2d. 348 (4th Cir. 1968); NLRB v. Prince Macaroni Mfg. Co., 329 F.2d 803 (1st Cir. 1964).

In total disregard for the statutory scheme, the Board has placed itself in the position of benevolent despot to dictate, with the unbridled assistance of the Circuit, what conduct constitutes "reasonable" so as to threaten and cause a union to be held in contempt. Such an attitude totally contravenes this Court's admonition to the Board that:

> Questions of construction had better be ironed out before enforcement orders issue than upon contempt proceedings. A party is

> entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court. Nor should he be ordered to desist from more on the theory that he may violate the literal language and then defend by resort to the Board's construction of it. Court orders are not be trifled with, nor should they invite litigation as to their meaning.

J.I. Case Co. v. NLRB, 321 U.S. 332, 341 (1944). Nor was it proper for the Circuit Court through an interlocutory order to redraft the Board's Order in a manner that the Circuit perceived the Board's intent to have been. NLRB v. United Wire & Supply Corporation, 312 F.2d. 11, 13 (1st Cir. 1962).

This Court must not view this case as merely involving an individual respondent union that has been found guilty of a civil contempt. Rather, the scheme of national jurisprudence cannot,

and should not, be blemished with a signal that ambiguity resulting in despotic powers by governmental agencies can be accepted. The consequences of governmental agencies being the prosecutor, as well as the decider of the law is repugnant to the American jurisprudential system.[4] The Circuit Court's refusal to clarify the ambiguity compounded the problem. The Court neglected its mandate by declining to definitively clarify the concept of "reasonable costs" when the Union pleaded for the Court's guidance. New Jersey v.

---

[4] Although the NLRB as initially established was responsible for acting as investigator, complainant, prosecutor, trier of facts and judge, such was deemed by Congress as an improper and unfair system which was rectified in the 1947 amendment to the NLRA. See, e.g., H.R. Rep. No. 245, 80th Cong., 1st Sess. 6 (1947) reprinted in 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 297 (1948).

New York City, 296 U.S. 259 (1935).

Now the Union has been found in contempt for not complying with an ambiguous order. The contempt order should not be permitted to stand. It places the Union in a position of having to give up more than was intended by the Board. The Union was entitled to an exact definition as to what it could do to avoid contempt. The Board and the Circuit Court refused to provide such to the Union.

POINT II

THE SECOND CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO WARRANT THIS COURT'S EXERCISE OF ITS SUPERVISORY POWERS

Without explanation, the Second Circuit has taken an order enforcing a decision of the NLRB, unilaterally modified it and thereafter found the Union in contempt of the original order.[5] Such was accomplished without even affording the Union an opportunity to present its case before a trier of

---

[5] The Court's original judgment enforcing the Order of the Board allowed for the Union to impose reasonable costs incurred in connection with requests to review, inspect, photocopy or duplicate, hiring hall records. The Court's interlocutory order provided that unless the Union relinquished its right to impose costs for reviewing, inspecting and duplicating and limited itself only to imposing the costs of photocopying, the Union would be deemed to be in contempt of the Court's original order.

facts.[6] The Circuit Court has acted in such a manner knowing full well that its actions are subject only to an extremely limited ability for review there being no automatic right of appeal.[7] The

---

[6] In proceedings before administrative agencies vested with discretion, the agency cannot exclude from consideration facts and circumstances relevant to its inquiry which may be of persuasive weight in the exercise of discretion. I.C.C. v. Chicago R.I. & P.I., 218 U.S. 88, 102 (1909; St. Joseph Stockyards Co. v.United States, 298 U.S. 38, 75, 78 (1935).

[7] The likelihood for this Court to grant review on a petition for certiorari is less than one (1%) percent. The Circuit Court, by not giving a reasoned analysis of its decision recognized that this Court would not be in a position to reflect upon the Circuit Court's theory for contempt. It is generally accepted that this Court, having a caseload of almost unmanageable proportions, looks not so much to the correctness or incorrectness of a lower court decision, but more to the ramifications such a decision will have on subsequent litigation. All that remains of this case for public consumption is the Order of Contempt. The Circuit Court's order will not disclose the facts or law relied upon and hence will not show a deviance

Circuit has effectively given the NLRB and the Court of Appeals a deadly weapon against all respondents within the grasp of the Second Circuit, without affording parties a means of shielding themselves from the government's unlimited prosecutorial powers. In the past, this Court has admonished that judicial contempt is a potent weapon to be used wisely and judiciously. International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n, 389 U.S. 64 (1967). Yet, the Second Circuit deviated from the accepted practice and found the Union to be in contempt of an ambiguous order without even affording the Union an opportunity to present

---

from accepted precedent of other circuits and this Court. See, Carter v. Stanton, 405 U.S. 669, 671-672 (1972).

evidence.[8]

The proposition is legally accepted in all circuit court decisions, that prior to a party being held in civil contempt, there must be a showing by clear and convincing evidence.[9] Research has failed to disclose a single court decision involving a contempt being found in an NLRB matter, where the

---

[8] Summary contempt adjudication is only permissible where contumacious conduct was performed in full view of the Court. Otherwise, a hearing on the facts is required. Groppi v. Leslie, 404 U.S. 505, 587 (1972); United States v. Sacher, 182 F.2d. 416, 418 (2nd. Cir. 1950), aff'd, 343 U.S. 1 (1952).

[9] See e.g., Powell v. Ward, 643 F.2d. at 933; In re Weiss, 703 F.2d 653 (2d. Cir. 1983); Reed v. Rhodes, 635 F.2d 556 (6th Cir. 1980); Ferrell v. Pierce, 785 F.2d 1372 (7th Cir. 1986); Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 889 (9th Cir. 1982); Southwestern Bell Tel. Co. v. N.L.R.B., 116 L.R.R.M. 2211 (BNA) (5th Cir. 1984); See also Folsom v. Blum, 554 F. Supp. 82[illegible] (S.D.N.Y. 1982); Swift v. Blum, 502 F. Supp. 1140 (S.D.N.Y. 1980); United States v. American Soc'y of Civil Eng'rs, 446 F.Supp. 803 (S.D.N.Y. 1977).

accused party was not afforded his day in court.[10] In each reported case, the burden was placed on the NLRB to prove by clear and convincing evidence that a contumacious act has occurred. Moreover, in the absence of contumacious conduct occurring in the presence of the judges, the use of summary proceedings would in any event be highly improper. In re Chaplain, 621 F.2d. 1272 (4th Cir. 1980); Groppi v. Leslie, 404 U.S. 505; United States v. Sacher, 182 F.2d. 416.

As to sanctions, the Court has

---

[10] See, e.g., NLRB v. Main Caterers, Inc., 654 F.2d 131 (1st Cir. 1981); Florida Steel Corp. v. NLRB, 648 F.2d. 233 (5th Cir. 1981); NLRB v. Gentzler Tool & Die, 126 L.R.R.M. (BNA) 3318 (6th Cir. 1987); NLRB v. FMG Indus., 820 F.2d. 189 (9th Cir. 1987); NLRB v. Laborers Fund Corp., 124 L.R.R.M. 2078 (9th Cir. 1986), where in lieu of an initial hearing, the Circuit Court clarified its previous order setting forth a specific course of action that should be followed and upon a subsequent application the matter was heard by a special master.

misread its authority by punishing the Union for the violations fraud. The Board in its remedial order, required a notice posting to members. This was complied with and is not contested. Yet, the Circuit Court has required a reposting, as well as a mailing of copies of the contempt adjudication to each member of the Union.

The purpose of civil contempt is twofold. It is meant to coerce future compliance and to remedy past compliance. EEOC v. Local 308 . . . Local 28 Sheet Metal Workers, 753 F.2d 1172, 1184 (2nd. Cir. 1985). The mailing could not remedy any past conduct since the subject of the contempt involved an interpretation of a provision of the order. This had nothing to do with the Union's obligations to post the notice and thereby notify its members of its obligations. In fact the Fifth Circuit has outright rejected this

type of remedy. Florida Steel Corp. v. NLRB, 648 F.2d. at 240-241.

POINT III

IMPORTANT FEDERAL PROCEDURAL ISSUES EXIST

The scope of federal contempt powers is an important area for Supreme Court review. U.S. v. Sacher. Important federal questions exist, which are left unanswered as a result of the events surrounding this case. The NLRB's practice of petitioning the various Circuit Courts of Appeals for summary contempt adjudication is an abuse of administrative power. Not one Court has found summary adjudication an appropriate vehicle where the conduct complained of did not take place in full view of the Court. Yet, the NLRB continues to petition for just that relief and the Second Circuit, deviating from the nationally accepted principle, has

acquiesced to the request. No guidance exists for the boundaries of fair play allowed the NLRB, a governmental agency. Moreover, a circuit court believes that it can modify a previous order by limiting a respondent's conduct to less than that previously permitted, under penalty of contempt of the original order. Additionally, no Supreme Court guidelines exist concerning the type of remedy that may be sought by the NLRB in contempt applications.

The prime responsibility for the proper functioning of the federal judiciary rests with the Supreme Court. The procedure followed by the Second Circuit raises serious, substantial and novel questions of importance. As the Court has recognized: "As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform an error-

correcting function in federal litigation." Florida v. Rodriguez, 469 U.S. 1, 7 (1984) (Stevens, J. dissenting).

It is manifestly improper to permit the NLRB to petition for summary adjudication in contempt in the Circuit Court when such relief is not properly available. It is further unfair for the Circuit to rubber stamp the Board's application without availing the accused an opportunity to defend itself. The impropriety is compounded when it is recalled that the underlying order was a nebulous one, which set absolutely no guidelines for compliance therewith.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully
submitted,

IRA A. STURM
Manning,Raab,Dealy & Strum
440 Park Avenue South
7th Floor
New York, NY
Telephone No.:
(212) 683-6699

Counsel of Record
January 20, 1989

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NLRB 2CB 9767, 9811, 9812

No. 86-4107

NOTICE OF MOTION

ORDER OF CLARIFICATION

NATIONAL LABOR RELATIONS BOARD

v.

CARPENTERS LOCAL 608

MOTION BY:
MANNING, RAAB, DEALY & STURM
440 Park Avenue South
New York, New York 10016
(212) 683-6699
IRA A. STURM, ESQ.

OPPOSING COUNSEL:
NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
1717 Pennsylvania Avenue North West
(202) 634-1582
GARY W. SHINNERS, ESQ.

Has consent of opposing counsel:

A. been sought? YES

B. been obtained? NO

Has service been effected? YES

Is oral argument desired? NO
(Substantive motions only)

Requested return date: January 19, 1987
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? YES

B. by firm date of argument notice? YES

C. If Yes, enter date: Appeal has already been determined.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? NO
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? NO

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? YES

Judge or agency whose order is being appealed:

NATIONAL LABOR RELATIONS BOARD

Brief statement of the relief requested:

An Order of Clarification is desired relating to the Court's affirming the decision of the NLRB, as to what constitutes "reasonable costs" within the meaning of the term as used in the National Labor Relations Board's Order dated April 30, 1986.

By: /s/ IRA A. STURM

Appearing for:

Carpenters Local 608 Defendant

Date: 12/24/87

ORDER

IT IS HEREBY ORDERED that the motion

DENIED

/s/ WILFRED FEINBERG, Chief Judge

/s/ ELLSWORTH A. VAN GRAAFEILAND

/s/ LAWRENCE W. PIERCE

Circuit Judges

Date: February 11, 1988

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REVISED ORDER

86-4107

NOTICE OF MOTION

SUMMARY ADJUDICATION IN CIVIL CONTEMPT
AND FOR OTHER CIVIL RELIEF

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CARPENTERS LOCAL 608, UNITED BROTHERHOOD
CARPENTERS & JOINERS OF AMERICA, AFL-CIO,

Respondent.

MOTION BY:	OPPOSING COUNSEL:
WILLIAM WACHTER (202) 254-9155 GARY SHINNERS (202) 254-1582 National Labor Relations Board 1717 Penn. Avenue, N.W. Washington, D.C. 20570	IRA A. STURM MANNING, RAAB, DEALY & STURM 440 Park Avenue South New York, NY 10016 (212) 683-6699

Has consent of opposing counsel:

A. been sought?	NO
B. been obtained?	NO
Has service been effected?	YES
Is oral argument desired? *(Substantive motions only)*	YES

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order?

B. by firm date of argument notice?

C. If Yes, enter date: June 30, 1988

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below?
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion?

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard?

Judge or agency whose order is being appealed:

Implementation of this Court's February 10, 1987 judgment enforcing an order of the National Labor Relations Board

Brief statement of the relief requested:

An order summarily adjudicating Respondent Local 608 in civil contempt of the Court's February 10, 1987 judgment requiring Local 608 to provide member John Harte with hiring hall information requested in February 1983.

By: /s/ Bernard Jeweler

Appearing for:

National Labor Relations Board Plaintiff

Date: June 14, 1988

ORDER

Before: Hon. Ralph K. Winter, Hon. Roger J. Miner, C.JJ., Hon. Franklin S. Billings, Jr., DJ

IT IS HEREBY ORDERED that that, unless respondent provides the court with evidence showing that the requested information has been made available at no cost other than the reasonable costs of photocopying, the motion shall be granted after 30 days from the date of this order.

/s/ RALPH K. WINTER

/s/ ROGER J. MINER

/s/ FRANKLIN S. BILLINGS, JR.

Circuit Judges

A true copy
Elaine B. Goldsmith

/s/ Elaine B. Goldsmith
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 86-4107

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CARPENTERS LOCAL 608, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO,

Respondent.

SUMMARY ADJUDICATION IN CIVIL CONTEMPT

BEFORE:

On June 14, 1988, the National Labor Relations Board ("Board") moved this Court to summarily adjudge Carpenters Local 608, United Brotherhood of Carpenters & Joiners of America, AFL-CIO ("Local 608") in civil contempt for the reason that Local 608 had failed and refused to comply with that provision of the Court's judgment of February 10, 1987, which requires Local 608 to provide member John Harte with certain hiring hall records requested in February 1983. On August 18, 1988, the Court issued an order which provides that unless Local 608 submits evidence to the Court showing that such requested information has been made available at no cost other than the reasonable cost of photocopying, the Board's motion shall be granted after thirty days from the date of the Court's order. Local 608 has failed to satisfy the Court that it has complied with the judgment of February 10, 1987, and order of August 18, 1988. Accordingly,

IT IS ORDERED AND ADJUDGED that Local 608 is in civil contempt of the judgment of this Court issued on February 10, 1987.

IT IS FURTHER ORDERED that Local 608, its officers, agents and representatives shall purge themselves of such contempt by:

1. Fully obeying and complying with the Court's judgment of February 10, 1987, and each of the provisions of the Board's order thereby enforced, and not in any way, by action or inaction, engaging in, inducing, encouraging, permitting or condoning any violation of the judgment;

2. Immediately providing John Harte with the hiring hall information requested in February 1983 at no cost other than the reasonable cost of photocopying;

3. Immediately posting in conspicuous places, including all places where notices to members of Local 608 are customarily posted, for a period of sixty (60) consecutive days, copies of the contempt adjudication and of an appropriate notice, in the form prescribed by the Board, signed by an appropriate representative on behalf of Local 608, which states that Local 608 has been adjudged in civil contempt of Court for disobeying and failing and refusing to comply with the judgment of this Court, and that Local 608 will immediately undertake the action in purgation set forth in the contempt adjudication, said notices, together with a copy of the adjudication, to be maintained in clearly legible condition throughout such posting period, and insuring that they are not altered, defaced, or covered by any other material;

4. Immediately signing, duplicating and mailing, at its own expense, copies of said notice and of the adjudication to all current members of Local 608 and all former members of Local 608 who were members since February 1983, and submitting a list of such persons and their addresses to the Regional Director, together with proof of mailing;

5. Filing sworn statements with the Clerk of this Court, and a copy thereof with the Regional Director of the Board's Second Regional Office, within fifteen (15) days after the order of adjudication, and again upon termination of the posting period,

showing what steps have been taken by Local 608 to comply with the Court's directives;

6. Paying to the Board all costs and expenses, including reasonable attorneys salaries, incurred by the Board in the investigation, preparation, presentation and final disposition of this proceeding; said amount, unless agreed to by the parties, to be fixed by further order of the Court upon submission by the Board of a certified statement of such costs and expenses. Should any dispute arise respecting the Board's submission as to which the Court may determine that a hearing is desirable, the Court, in its discretion, may refer such dispute to a special master, upon such terms as the Court shall determine, for a report and recommendation.

IT IS FURTHER ORDERED that in order to verify and ensure compliance with the Court's judgment and contempt order, the Board may obtain discovery from any person, including, but not limited to, Local 608, its officers, agents, representatives and employees, in the manner provided by the Federal Rules of Civil Procedure, upon any matter reasonably related to compliance with the Court's February 10, 1987 judgment or this contempt order; and that, should a dispute arise between the parties respecting such discovery, upon the motion of either party the Court shall appoint a special master, with such duties and powers as the Court shall specify, to supervise the discovery; and that failure to engage in discovery in the manner required by the Federal Rules of Civil Procedure shall be treated as contempt of this Court.

/s/ RALPH K. WINTER

/s/ ROGER J. MINER

/s/ FRANKLIN S. BILLINGS

DATED;

United States Court of Appeals

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of March one thousand nine hundred and eighty-seven

Present: HON. WILFRED FEINBERG, Ch. J.
HON. ELLSWORTH A. VANGRAAFEILAND,
HON. LAWRENCE W. PIERCE,
Circuit Judges,

Docket No. 86-4107

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

— *v.* —

CARPENTERS LOCAL 608, UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA, AFL-CIO,
Respondent.

A petition for a rehearing having been filed herein by CARPENTERS LOCAL 608, UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA, AFL-CIO, upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

/ s / Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 621—August Term, 1986

(Argued: January 7, 1987 Decided: February 10, 1987)

Docket No. 86-4107

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

— against —

CARPENTERS LOCAL 608, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Respondent.

Before:

FEINBERG, *Chief Judge,* VAN GRAAFEILAND and PIERCE,
Circuit Judges.

Petition by National Labor Relations Board to enforce order requiring union to honor members' requests to inspect and duplicate hiring hall records.

Order enforced.

IRA STURM, New York, NY (Manning, Raab, Dealy & Sturm, of Counsel), for Respondent.

FREDERICK HAVARD, Attorney, National Labor Relations Board, Washington, DC (Rosemary M. Collyer, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Howard E. Perlstein, Supervisory Attorney, National Labor Relations Board, Washington, DC, of Counsel), for Petitioner.

FEINBERG, *Chief Judge*:

The National Labor Relations Board (the Board) petitions for enforcement of an order requiring Carpenters Local 608, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the union), to permit union members to inspect and duplicate hiring hall records that contain the names, addresses and telephone numbers of persons who had used the hiring hall. The union objects to enforcement, arguing that its refusal to supply those records did not constitute a breach of its duty of fair representation under section 8(b)(1)(A) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(b)(1)(A), and contending that the Board's order conflicts with section

401(c) of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 481(c), which permits a union to keep its membership lists confidential. For the reasons that follow, we enforce the Board's order.

I.

The order under review concerns the efforts of three union members, John Harte, Franklin McMurray and Eugene Clarke (the dissidents), to obtain information concerning the union's hiring hall and referral practices. The union operated its hiring hall through a telephone referral system; members seeking work as well as employers needing workers would call the union, and the union would refer workers to particular jobs. The union maintained daily and monthly "shape-up" and "referral" lists. The former contained names and telephone numbers of persons requesting referrals; the latter contained the names of workers and the employers to whom they were referred. According to the union, workers were referred to jobs in the order in which they called in, taking into account any special qualifications requested by the employer and any worker's preference for certain types of work.

Harte, McMurray and Clarke were founders of a dissident group within the union called "Carpenters for a Stronger Union," and each had been involved in unsuccessful election campaigns against incumbent union officers. At union meetings and in publications distributed to union members, the dissidents objected to various union policies and criticized the performance of several union officers. Some of their concerns related to the operation of the hiring hall. The dissidents maintained that the referral system was unfair and arbitrary, did not allow members to check whether referrals were being administered fairly,

and gave Paschal McGuiness, the union's business manager, and his staff, too much control.

Beginning in the summer of 1982 and continuing into the first half of 1983, the dissidents made several requests of union officials to inspect hiring hall records. The dissidents were concerned that their activities within the union were adversely affecting their referral opportunities. The dissidents, however, were never permitted to inspect those records. Instead, they were shown their individual work cards, which reflected when each had called the union for work and when each had been referred to a job.

In February and March 1983, the dissidents filed unfair labor practice charges against the union, claiming that the union violated its duty of fair representation when it refused their requests to inspect the hiring hall records. In March 1985, the Administrative Law Judge (ALJ) held that the union had violated section 8(b)(1)(A) of the NLRA by arbitrarily refusing the dissidents' requests to inspect the records and by refusing to supply them with information concerning the operation of the hiring hall. In April 1986, the Board affirmed the ALJ's rulings, findings and conclusions, and ordered the union, among other things, to allow its members to "review, inspect, photocopy, or duplicate all hiring hall records." This petition by the Board for enforcement followed.

II.

A union breaches its duty of fair representation in violation of section 8(b)(1)(A) of the NLRA when it arbitrarily denies a member's request for job referral information, when that request is reasonably directed towards ascertaining whether the member has been fairly treated with

respect to obtaining job referrals. See NLRB v. Local 139, International Union of Operating Engineers, 796 F.2d 985, 992-94 (7th Cir. 1986) (hereinafter Local 139). See generally Vaca v. Sipes, 386 U.S. 171, 177 (1967). Unions must "deal fairly" with such requests, Local 139, 796 F.2d at 993, and in resolving disputes over disclosing information the Board must balance the member's need for the information against the union's legitimate interest in keeping the information confidential. See Id. Cf. Detroit Edison Co. v. NLRB, 440 U.S. 301, 314-15 (1979) (union requests for information from employer); NLRB v. Local Union 497, International Brotherhood of Electrical Workers, 795 F.2d 836 (9th Cir. 1986) (hereinafter Local 497) (employer request for hiring hall information).

The union argues that the Board erred in finding that the dissidents had a good faith reason for seeking the hiring hall records, contending that the dissidents' requests should be considered within the context of their efforts to gain elective office within the union. The union claims that the dissidents requested the information in connection with their intra-union political activities and maintains that the union justifiably rejected their demands since the leadership was properly elected. We disagree. Characterizing this dispute solely as part of the dissidents' attempt to wrest control of the union from the incumbents would unnecessarily constrict the rights of members seeking union office and penalize them for exercising activities that are protected under the NLRA. See 29 U.S.C. § 158(b)(1)(A). Even if the dissidents had political purposes for the information, the union could not deny their requests as long as the dissidents were also motivated by a reasonable belief that they were being treated unfairly by union officials in connection with work assignments. See NLRB v. Leonard B. Herbert, Jr. & Co., 696

F.2d 1120, 1126 (5th Cir.), cert. denied, 464 U.S. 817 (1983); Utica Observer-Dispatch, Inc. v. NLRB, 229 F.2d 575, 577 (2d Cir. 1956).

The union's arguments challenging the dissidents' motives do not require extended discussion, and only two arguments warrant any discussion at all. The union claims that McGuiness' determination that the dissidents had received their "fair share" of work was a satisfactory response to their requests for information. McGuiness. however, only reviewed the dissidents' individual work records. That investigation could not have addressed the dissidents' concern that they were being treated unfairly as compared to other workers because McGuiness did not anlayze the job referral records of any other persons using the hiring hall. In any event, a union is not permitted to refuse a request for information based on its own determination that the grievance underlying the request is non-meritorious or that the information sought is not essential. Cf. NLRB v. Associated General Contractors. 633 F.2d 766, 771-72 (9th Cir. 1980), cert. denied. 452 U.S. 915 (1981). If the request is made in good faith. members are entitled to receive the information and determine for themselves whether they have a claim that the union has discriminated against them.

The union also notes that McMurray, who ran against McGuiness in a June 1983 election, attempted to obtain the names and addresses of union members by recording this information without the union's knowledge or consent. The ALJ properly found that this event did not affect McMurray's good faith basis for seeking the hiring hall records because it occurred after he had made almost all of his requests. Moreover, as the Board points out. the hiring hall information "would not have done [the dissi-

dents] much good" in their political activities because the referral lists contain information concerning only 700 to 800 of the union's 3200 to 3500 members.

The record in this case contains ample evidence that the dissidents' requests for hiring hall records were based on a good faith belief that they were being treated unfairly. For example, almost all of the dissidents' requests were made while they were unemployed and awaiting referral and while union officials were announcing that there was 100% employment among the membership. There was also evidence that the dissidents' work cards contained incorrect information and that the dissidents were offered referrals to jobs outside of their specialties when the union had apparently just referred other workers to jobs in those specialties. We therefore conclude that there is "substantial evidence on the record considered as a whole" to support the Board's finding that the dissidents had a good faith basis for requesting the hiring hall records. Universal Camera Corp. v. NLRB. 340 U.S. 474, 493 (1951).

The union also argues that its denial of the dissidents' requests was not arbitrary and therefore did not constitute a breach of its duty of fair representation. The union notes that it is not required to honor all requests for information, but need only "deal fairly" with such requests, see Local 139, 796 F.2d at 993, and claims that its denial of the dissidents' requests to inspect hiring hall records was reasonably based on its desire to protect confidential information. The ALJ found, however, that the union's claims of confidentiality were only an "afterthought," and that they were "entirely specious and pretextual." He noted that the union did not have a formal or written policy of confidentiality with respect to this information. In

fact, union officials admitted that they had "no guidelines or precedents" for responding to requests for information.

By contrast, there was substantial evidence that the union did not consider this information to be confidential. McGuiness stated at union meetings that job referral lists were available for anyone to examine, and Article VII, section 1, of the collective bargaining agreement then in effect between the union and the employer associations required the union to "establish and maintain an open employment list." It is also significant that union officials never raised their confidentiality concerns with the dissidents as a reason for denying their requests, and that the union did not offer any evidence that its members sought to keep this information confidential.

On this record, the Board could properly determine that the dissidents' interest in assuring the protection of rights that they reasonably suspected were being violated outweighed any legitimate interest the union had in keeping the hiring hall records confidential. See Local 139, 796 F.2d at 992-94. Accordingly, we affirm the Board's holding that the union violated section 8(b)(1)(A) by arbitrarily denying the dissidents' reasonable requests to inspect hiring hall records.

III.

The union also attacks the scope of the Board's remedy. It claims that the dissidents, through their requests for hiring hall records, should not be allowed to obtain information concerning the membership that they are not otherwise entitled to receive. This argument is based on section 401(c) of the LMRDA, 29 U.S.C. § 481(c), which requires labor organizations to,

> comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's

> expense campaign literature in aid of such person's candidacy to all members in good standing of such organization. . . .

and gives every bona fide candidate for office,

> the right, once within 30 days prior to an election . . . to inspect a list containing the names and last known address of all members. . . .

Under the LMRDA, a union may keep its membership lists confidential if it complies with the requirements set out in section 401(c) and if it treats all candidates for union office equally in denying requests for the lists. See Schultz v. Radio Officers' Union, 344 F. Supp. 58, 67-69 (S.D.N.Y. 1972); Conley v. Aiello, 276 F. Supp. 614, 616 (S.D.N.Y. 1967). The union claims that it has never allowed any such requests and argues that the Board failed to construct a remedy that adequately considered the union's right, under the LMRDA, to keep its membership lists confidential.

The LMRDA, however, only regulates intra-union election campaigns and does not prohibit a union from granting more extensive disclosure than the minimum the statute requires. It would be anomalous to conclude that the LMRDA, a statute designed to protect union members from potential abuse by union officials, see Marshall v. Local Union 478, Laborers' International Union, 461 F. Supp. 185, 188 (S.D. Fla. 1978), prohibits a union from disclosing names, addresses and telephone numbers of union members where, as here, such information is necessary to determine whether the union has violated a worker's rights. See Local 139, 796 F.2d at 992-993; Local Union 497, 795 F.2d at 838. See also Conley v. United Steelworkers of America, Local Union No. 1014, 549

F.2d 1122, 1125 & n.4 (7th Cir. 1977); Local 324, International Union of Operating Engineers, 226 N.L.R.B. 587, 599 n.34 (1976) (LMRDA does not "delimit[ ] the scope of a union's obligation to furnish information to the employees it represents").

We also reject the union's contention that the portion of the Board's order permitting the dissidents to copy addresses and telephone numbers of members using the hiring hall was overbroad. The dissidents will need this information to verify the accuracy of the hiring hall records. Although it is conceivable, as the union now suggests, that the Board could have provided the same relief and kept the information confidential by having union employees check the information, considering the animus between the union and the dissidents in this case we cannot say that the Board abused its broad discretion. Lipman Motors, Inc. v. NLRB, 451 F.2d 823, 829 (2d Cir. 1971), in ordering a remedy that would enable the dissidents to verify the records. See NLRB v. International Brotherhood of Electrical Workers, Local 575, 773 F.2d 746, 750 (6th Cir. 1985).

The Board's order is enforced.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CARPENTERS LOCAL 608, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL--CIO (Various Employers)

and

JOHN HARTE, an Individual	Case 2--CB--9767
FRANKLIN McMURRAY, an Individual	Case 2--CB--9811
EUGENE CLARKE, an Individual	Case 2--CB--9812

DECISION AND ORDER

On 26 March 1985 Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and

---

[1] The General Counsel has excepted to the judge's inadvertent failure to conform his recommended Order to his findings. We have modified the recommended Order and notice accordingly.

Because this case involves an exclusive hiring hall, we find it unnecessary to consider, and do not rely on, the judge's discussion concerning a union's obligation in operating a nonexclusive hiring hall.

orders that the Respondent Carpenters Local 608, United Brotherhood of Carpenters and Joiners of America, AFL – CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 1(a) and (b).

"(a) Denying employees whom it represents in collective bargaining the right to review, inspect, photocopy, or duplicate all hiring hall records (on payment of reasonable costs), or refusing to provide such employees information, on request, with regard to the operation of its hiring hall, where such information or request is related to an alleged failure to properly refer such employees because said employees engaged in intraunion political activities or other protected concerted activities.

"(b) Arbitrarily denying employees whom it represents in collective bargaining the right to review, inspect, photocopy, or duplicate all hiring hall records (on payment of reasonable costs), or refusing to provide such employees information, on request, with regard to the operation of its hiring hall where such information or request is related to an alleged failure to properly refer such employees."

2. Substitute the following for paragraph 2(a).

"(a) Honor requests by Eugene Clarke, Franklin McMurray, and John Harte to inspect, review, photocopy, or duplicate all hiring hall records (on payment of reasonable costs), and provide such employees information on request with regard to the operation of its hiring hall, where such requests are related to the alleged failure to properly refer such employees, including but not limited to those requests made by letter in February 1983."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C.

30 April 1986

Donald L. Dotson, Chairman

Patricia Diaz Dennis, Member

Wilford W. Johansen, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT deny employees whom we represent in collective bargaining the right to review, inspect, photocopy, or duplicate our hiring hall records (on payment of reasonable costs), or refuse to provide such employees information on request, with regard to the operation of our hiring hall, where such information or request is related to our alleged failure to properly refer such employees because said employees engaged in intraunion political activities or other protected concerted activities.

WE WILL NOT arbitrarily deny employees whom we represent in collective bargaining the right to review, inspect, photocopy, or duplicate our hiring hall records (on payment of reasonable costs), or refuse to provide such employees information with regard to the operation of our hiring hall, where such information or request is related to an alleged failure to properly refer such employees.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL honor requests by Eugene Clarke, Franklin McMurray, and John Harte to inspect, review, photocopy, or duplicate our hiring hall records (on payment of reasonable costs), and provide such employees information, on request, with regard to the operation of our hiring hall where such requests are related to our alleged failure to properly refer such employees.

CARPENTERS LOCAL 608, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL--CIO

_____

(Labor Organization)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any question concerning this notice or compliance with its provisions may be directed to the Board's Office, Jacob K. Javits Federal Building, 26 Federal Plaza, Room 3614, New York, New York 10278, Telephone 212--264--9360.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
NEW YORK, NEW YORK

CARPENTERS LOCAL 608, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO (VARIOUS EMPLOYERS)

and Case No. 2-CB-9767

JOHN HARTE, An Individual

and Case No. 2-CB-9811

FRANKLIN McMURRAY, An Individual

and Case No. 2-CB-9812

EUGENE CLARKE, An Individual

Sandra Grossfeld, Esq. and *Stephen Appell, Esq.*, New York, NY for General Counsel.
Ira Sturm, Esq. (Manning, Raab, Dealy and Sturm), New York, NY for Respondent.[1]

DECISION

Statement of the Case

STEVEN B. FISH, Administrative Law Judge: On February 22, 1983[2] John Harte, herein called Harte, filed a charge in Case

---

[1] During the trial of the instant matter, Respondent was represented by David Lew, Esq. of Bart & Lew, New York, NY. The above cited firm was substituted as counsel subsequent to the close of hearing and filed a brief on behalf of Respondent.

[2] All dates hereinafter, unless otherwise indicated are in 1983.

No. 2-CB-9767, against Carpenters Local 608, United Brotherhood of Carpenters and Joiners of America, AFL--CIO, herein called Respondent, alleging violations of Section 8(b)(1)(A) and (2) of the Act by failing and refusing to provide Harte with names, addresses and telephone numbers of persons who have applied for or been given referral to employment by Respondent within the past six months.

On March 22, Frank McMurray, herein called McMurray, filed a charge against Respondent in Case No. 2-CB-9811, alleging an 8(b)(1)(A) violation of refusing to provide McMurray with the number of names on its job lists, because McMurray and another member of Respondent filed charges with the Board. The charge also contains a "by these others acts" clause.

On March 23, Eugene Clarke, herein called Clarke, filed a charge against Respondent in Case No. 2-CB-9812, alleging 8(b)(1)(A) and (2) violations by refusing to allow Clarke to inspect and examine the referral lists of Respondent containing the names, addresses and phone numbers of persons who had requested referrals, and by discriminating against Clarke with respect to job referrals, because he engaged in concerted activity protected by Section 7 of the Act.

On April 29, the Director for Region 2 issued an Order Consolidating the above cases along with a Complaint and Notice of Hearing, alleging that Respondent violated Section 8(b)(1)(A) of the Act, by failing and refusing to provide Harte, McMurray and Clarke with names, addresses, and telephone numbers of all persons who have asked to be referred or have their names placed on the list by Respondent for referral, dates of such request, the identity of each person referred and dates of each referral, where they were referred, dates of hire, layoffs or discharge.[3]

---

[3] The 8(b)(2) portion of the charges filed by Harte and Clarke were withdrawn. McMurray as noted did not allege 8(b)(2) violations in his charge.

A hearing was held before me with respect to the allegations in said complaint in New York, New York on December 12, 20, 21 and 22, 1983 and April 10 and 11, 1984. Briefs have been received from Respondent and General Counsel and have been duly considered.

Upon the entire record,[3A] including my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Building contractors Association Inc. (BCA), and the Cement League, herein collectively called the Associations, are associations of employers engaged in the construction and building trades, and which exist for the purposes of representing their employer-members in collective bargaining and negotiating and administering collective bargaining agreements with labor organizations, including the District Council of New York and Vicinity of the United Brotherhood of Carpenters and Joiners of America, herein called District Council and Respondent.

Annually, the employer-members of each of the Associations, in the course of their business operations, collectively, purchase goods and materials valued in excess of $50,000 directly from firms located outside of the states wherein said employer-members are located.

It is admitted and I find that each of the Associations, and their respective employer-members, are now, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted and I so find that Respondent is now, and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

[3A] General Counsel's unopposed Motion to Correct the Transcript is hereby granted, as set forth in Appendix B.

II. Facts

A. Respondent's Hiring Hall Procedures

At all times material herein, Respondent has been a constituent member of the District Council, which includes all Local Carpenter Unions within the City of New York. For a number of years Respondent as a constituent member of the District Council, was a party to a series of collective bargaining agreements with the various associations covering employees falling within the jurisdiction of Respondent.

A collective bargaining agreement running from July 1, 1981 to June 30, 1984, was executed by the parties, and was binding upon and enforced and maintained by Respondent during this period of time.

The contract contains the following provisions:

Article VI Section 2 of the agreement provides:

> The first Carpenter on the jobsite shall be referred by the Union. The Second Carpenter shall be the Employer's selection. The balance shall be 50% from the Union and 50% from the Employer. The Union will cooperate, in order to meet all legal requirements, and furnish qualified Carpenters when requested. A working Job Steward shall be appointed by the Union . . .
>
> When a Employer, in compliance with this Section, requests the District Council to send men to a job, the District Council shall cooperate by sending only such as are experienced in the specific type of carpentry work being done on the said job by that Employer. There shall be no discrimination of any kind against any person covered by this agreement, based on race, religion, age, sex, national origin or Union affiliation with respect to hiring, firing, or any other conditions of employment.

> Article VII, entitled "Job Referral System, provides that:
>
> In the referral of applicants by the Union for employment as provided for in Article VI, Section 2, by the following provisions shall govern:
>
> Section 1. The Union shall establish and maintain an open employment list for the employment of competent workmen. This list shall be established and maintained on a non-discriminatory basis and shall not be based on, or in any way affected by race, creed, color, nationality, age, sex, or Union membership, by-laws, rules, regulations, constitutional provisions of any other aspect or obligation of Union membership, policies or requirements.

Prior to 1979 in connection with the implementation of the referral procedure set forth above, Respondent had operated a hiring hall wherein applicants would shape-up at Respondent's offices on a daily basis. Sometime in early 1979, Respondent had a fire at its premises, which the landlord allegedly blamed on Respondent's use of its "dayroom", which was utilized by it for shaping up by applicants. Accordingly by a letter dated August 9, 1979, Respondent announced that as of August 20, 1979 it would no longer utilize a shape-up system. The letter explained that the landlord had claimed that Respondent was violating its lease by allowing a dayroom and requested its discontinuance. Additionally, the letter asserted that Respondent's Executive Board felt that the present system was wasteful and expensive to the membership, and decided to adopt a call in system, similar to the practice of other carpenter locals in the area.

The system instituted by the August 1979 letter was still in effect as of the hearing herein, which requires applicants to call in to Respondent between 2:30 and 3:30 p.m. to request a referral. The applicant must provide his name, telephone number and Ledger Page number. Applicants are told to be available at the given telephone number between 7:00 a.m. to 9:00 a.m.

in the morning, when representatives of Respondent contact them to notify them of a possible referral. Employers can call the Respondent to seek employees at anytime. Consequently it sometimes becomes necessary for Respondent's agents to call applicants and offer them jobs of the day or evening, other than from 7:00 to 9:00 a.m.

Respondent maintains three different sets of documents in connection with the operation of its referral system. When an applicant first calls in to use the hiring hall, a 5″8″ identification card for each member, sometimes referred to as a worksheet or work card is prepared. These cards or worksheets contain the applicants name, a telephone number where he can be reached, his Ledger Number, and his specialty, if any.*

Respondent also utilizes a shape-up list, which is maintained on a daily basis and maintained thereafter in a monthly folder. Each daily page of the shape-up list contains the name of other employees requesting shape-up, his or her ledger page number and telephone number. Respondent also maintains referral lists which are similarly maintained on a daily basis and thereafter in monthly folders. The referral lists, through the end of 1982, were made up of two columns, the first column containing the name of the Employer to whom referral was made and the job location, and the second column indicating the name of the employee or employees referred to that particular job. In 1983, the referral list added two additional columns, entitled "specialty" and "requested". Each page bears a date, but no times of call-ins or referrals are listed on any of the records.

Paschal McGuiness, Respondent Business Manager, is Respondent's chief operating official, with four assistant representatives reporting to him. John Boyle, one of these assistant business representatives, was assigned by McGuiness the responsibility of maintaining the above described hiring hall records. Other

---

* In the industry, carpenters perform a variety of specialty work such as "finish, dry wall, ceilings and concrete". Employers will frequently request employees to perform these specialties. Many carpenters usually look for work only in the specialties, and will not accept work in other specialties.

assistant business representatives such as John F. O'Connor, Martin Ford, and John Keane, are also involved in the process of operating Respondent's hiring hall system.

When applicants call in to request a referral, as noted, a card or worksheet is made up for them. Each time an applicant calls for a referral, one of the Respondent's officials places a "C" on his worksheet, or card and places his name on the shape-up list. The card of the applicant is then placed on the wall in the order of their calling in. Referrals are made according to Respondent's officials, in order from the shape-up list or from the cards on the wall, taking into consideration the specialty that may be requested by the Employer, as well as the preferences of the particular carpenter for performing certain types of work, as appears on his records.

If Respondent is unable to contact the applicant, a notation of "N" is placed on his card. If the person is contacted and refuses a referral an "X" is placed on his card. If the person refuses a referral and provides an explanation, such a illness, an "XX" is placed on his card. In either event, a person is not penalized for either refusing a job or not being home when called, and he retains his place on the list. Respondent will then go down the list of names until the job is filled, sometimes even calling back an applicant who it had been unable to reach earlier.

When an applicant is referred an "R" is placed on his card. If an applicant obtains his own job, he is supposed to call in and notify Respondent of same, in which case a "W" is placed on his card. Then the applicant will not be called until he again calls when that job is completed and requests a referral, and his name is again placed on the shape-up list, and "C" is marked on his card.

Boyle testified that Respondent has approximately 3,200 to 3,500 members, and of that number 700-800 use its hiring hall on an annual basis. The remaining over 2,000 members, according to Boyle obtain jobs on their own. As noted Respondent's contracts with the two Associations provide for a hiring procedure, wherein the first carpenter on the jobsite shall be

referred by Respondent, the second shall be the Employer's selection, and the remaining employees, 50% from each source. No evidence was adduced on this record, and these requirements have not been adhered to by the parties.

B. Dissident Activities of the Charging Parties

It is undisputed that Harte, McMurray and Clarke (herein called collectively the charging parties), are and have been well known Union dissidents for several years. Harte's problems with Respondent began as far back as 1973, when he was denied admission into Respondent upon his attempt to transfer from another Local and filed a lawsuit to gain admission. In late 1981, the three members met and discussed various complaints that they had about the operations of Respondent, and formed a dissident group named "Carpenters for a Stronger Union". Clarke was president, McMurray Vice President and Harte was Coordinator of this group. During 1982 the individuals began to complain at Respondent's meetings about various union policies, as well as speaking to various carpenters about their concerns.

Some of their main complaints were the lack of a shape-up room, Respondent's pension plan, an alleged lack of democracy in the Local, as well as alleged corruption among its officials.

During 1982 as well as in early 1983, the group prepared, published, and distributed anti-incumbent literature at union meetings, jobsites and at the union hall. This literature included newsletters entitled *On the Level*, and *The Rusty Nail*. These documents were highly critical of Respondent's operations in general, and its officers and officials in particular. A number of the newsletters accused Respondent's representatives of corruption, emphasizing their relationship with Theodore Maritas, president of the District Council, who was indicted on various Federal criminal extortion charges, disappeared before a trial could be held and was believed to have been killed.

These newsletters also criticized the allegedly high salaries, and benefits of Respondent's business agents, as well as business manager McGuiness. Respondent's failure to have a dayroom

or shape-up hall was also emphasized, where it was suggested in answer to Respondent's alleged concerns for the expense of such a hall, that Respondent could afford to have a dayroom by merely eliminating the salary of a business agent. A number of the newsletters dealt with the hiring hall issue, contending that the present telephone system was unfair, and arbitrary, and affords the business agents too much control over hiring, while not affording the member sufficient opportunity to check to see if he is being discriminated against or to decide whether or not to turn down a job that he might not want.

Additional areas of criticism in these publications included the Respondent's pension plan, apprentice system, and policies with regard to dues and assessments.

All three of the charging parties were involved in election campaigns against the incumbent administration. In June of 1982, Harte ran for Trustee on an opposition slate to the then present leadership. He was defeated and appealed the results to the International, but never received an answer to his appeal. Clarke attempted to run for Local President, but was not permitted to run for office, because he had been suspended from Respondent's meetings because of his alleged disruptive conduct at meetings.[5]

McMurray unsuccessfully opposed the incumbent business manager McGuiness in the June 1983 election, receiving approximately 12% of the votes. Harte and Clarke acted as the observers for McMurray at this election. McMurray challenged the results of the election to the International claiming certain alleged election irregularities by the incumbent slate of officers. His appeal was turned down by the International.

---

[5] Clarke was nominated for the position of president by Harte to run against incumbent John J. O'Connor at the May 1982 meeting. O'Connor who was chairing the meeting rejected the nomination, because it was allegedly contrary to Respondent's Constitution. O'Connor then realizing that he himself was a candidate for President, relinquished the chair to McGuiness who made the same decision and did not accept the nomination of Clarke.

The record reveals several instances of animus displayed by Respondent's officers towards some of these activities engaged in by the charging parties. Thus at Respondent's meeting of October 8, 1982, McMurray made some critical comments about Respondent's policies and made a motion to end a 15 cent assessment. Immediately McGuiness asked for the floor. He then proceeded to criticize the "small group or minority that is printing garage and passing it out." He referred to the publications being passed out as "deliberate lies", and "indecent pieces of literature that are being handed out", stated that he was "telling your Brothers to ignore this garbage if you have decency at all." He also at a further point in his remarks asked the members, not to "be like this small minority group, do not lower yourself to their class."

At a Union meeting on February 28, 1983, McMurray raised a question about the hiring hall list. John J. O'Connor interjected angrily that since he and Harte had filed charges against Respondent at the NLRB, that Respondent would not answer any questions about the job list.[6] O'Connor then read a letter from Respondent's attorneys congratulating the Local and its officers for their professional manner in keeping their referral lists, which were utilized in connection with the defense of a prior charge, filed and withdrawn by Clarke with the Board.[7]

McGuiness then remarked that members who bring charges to the Labor Board cost the Local money, because they have to pay for lawyers.

Later on in the meeting, McMurray spoke regarding the salaries of business agents. John F. O'Connor interrupted and called McMurray an "ungrateful bastard", and refused to permit

---

[6] In fact as of that date Harte and not McMurray had filed charges with the Board.

[7] The letter referred to Case No. 2-CB-9630, which apparently involved a challenge by Clarke to the hiring hall. The record is silent as to the precise details of this charge or when it was filed or withdrawn.

him to continue speaking. O'Connor also added that Harte and McMurray had brought charges with the NLRB and that they were "bastards trying to destroy the Union."

At the next meeting, McMurray objected to the acceptance of the minutes because neither of the above comments of O'Connor nor McGuiness were reflected therein. McMurray's objections were ignored and the minutes accepted.[8]

Finally, on or about January 25, 1983 Harte was distributing dissident literature at Respondent's offices. Martin Ford, one of Respondent's business agents told him to leave the premises, stop distributing literature and that he had no business being there. Ford added that if Harte distributed any more literature Ford would have him beaten up.[9]

The next day Harte returned to Respondent's offices with McMurray and began to hand out more literature to members. John F. O'Connor approached and told them to stop handing out literature, and if not he would have them arrested. The men then left the premises.[10]

C. The Efforts of the Charging Parties to Obtain Hiring Hall Information

At nearly every monthly meeting held by Respondent between May through December 1982, either or both John F. O'Connor or McGuiness made comments to the membership that the Local had 100% employment, and/or that work opportunities were plentiful. In fact at the October 18, 1982 meeting, McGuiness stated in response to a question by McMurray about the employment situation that Respondent "had better than 100% employment in this the best local union in the United Brotherhood."

---

[8] The above from the uncontradicted testimony of Harte and McMurray.

[9] Based on the credible testimony of Harte. Ford did not testify, but the parties stipulated that if he were called to testify he would deny making any threats to Harte. I credit Harte.

[10] Based on the essentially mutually corroborative testimony of Harte and McMurray.

In July 1982, Harte made the first of a number of oral requests to inspect the hiring hall lists. He made these requests on a number of occasions during the months of July through the end of September. Whenever Harte was out of work, during this period he would call and ask that his name be placed on the referral list. When after not receiving referrals for a short period of time thereafter, and hearing at meetings of 100% employment, Harte asserts that he wanted to see the list to see where he stood. Harte would ask either O'Connor, Tom O'Kelly or McGuiness to see the hiring hall list. They responded that he (Harte) will be called for employment, but would not show him the list.

On October 12, 1982 McMurray called into the hiring hall and requested that his name be placed on the referral list. By October 18, he had not been offered a job, although he had been told by other carpenters that there was a lot of work at the time in "finishing", which was his specialty. McMurray was also concerned that since he had been speaking up at meetings, that this may have adversely affected his referral opportunities.[11]

McMurray concluded that he wanted to check and see if was getting his fair share of work. Therefore at the October 18 meeting, he asked whether Respondent kept a job list and whether the members were entitled to see it. McGuiness replied that the Local does keep a job list, and that any member could see if any time that they wanted.[12]

On the day following the meeting, October 19, Harte, McMurray, Clarke and a fourth member, Jerry McDonough went to the Respondent's office to see the hiring list. Harte and McMurray at first saw John F. O'Connor and asked him to see the job list. O'Connor returned with their work cards. They

---

[11] McMurray had been told by other members that if he spoke up at meetings, he would not get work.

[12] Based on the testimony of McMurray, substantially corroborated by Harte,

insisted that this was not sufficient and again asked to see the job list. O'Connor replied that if they wished to see anything else other than their work cards, they would have to see McGuiness.

A few hours later Harte, McMurray and Clarke each saw McGuiness individually.[13] McMurray asked McGuiness to see the job list, and reminded him of the fact that he had said at the meeting that all members could see the job list whenever they wanted to. McGuiness replied that he couldn't show McMurray the list, and mentioned that McMurray was a family man and needed to support his family. McMurray again requested to see the list. McGuiness continued to refuse to show it to him, and did not provide him with an explanation for not doing so, although McMurray asked why he couldn't see it. Finally McGuiness asked McMurray if he wanted a job. McMurray said yes, and McGuiness referred him to a job which lasted five hours.

Harte, who at the time was also out of work,[14] and awaiting referral from Respondent's hall, asked McGuiness where he stood on the list. McGuiness showed him his work card, and explained to Harte the various codes appearing therein, which indicated that he had been called on certain days and was not home and that he had refused a job. Harte replied that he never refused a job and that he was always home, so that the cards were not accurate.

Harte again asked where he stood on the list, saying that his card was not meaningful since it did not show his position on the list relative to others. McGuiness answered that he (Harte) was a smart fellow and had a family to support. Harte continued that he didn't want a lecture, but just wanted to see the

---

[13] The fourth member who accompanied the charging parties, McDonough, did not wait around to see McGuiness and left the premises.

[14] According to Respondent's record card, Harte had called in for referral on 10/8/82.

list. McGuiness concluded that he "can't show" Harte the list, and that Harte would be getting a job in a few days. Harte was referred by Respondent to a job, a few days later.

Clarke, who was also not working on that day,[15] asked McGuiness to show him the hiring hall list. McGuiness instead showed him his card and began to explain it to Clarke. Clarke said that he knew about the card, but that was not helpful to him since it did not show where he was on the list and who was ahead of him, and he wished to see where he stood. McGuiness responded that he couldn't show Clarke the list and gave no reason for not doing so.

Thereafter at a number of subsequent membership meetings, McMurray asked why members were not allowed to see the job list. McGuiness responded by stating how democratic the Local was, but did not reply to McMurray's question.

McMurray after being referred to a five hour job by McGuiness on October 19, protested to the hall that this was only five hours work. A day or two later Ford called him and referred McMurray to a job for Nastasi White, which lasted for one day. McMurray then obtained his own job for a firm called Amberg which lasted from November 1982 through the end of January 1983.

Harte was laid off from a job on January 23, 1983, and called in to place his name on the list. On January 25, he went to Respondent's premises and asked John F. O'Connor to see the list. O'Connor replied that Harte could not see the list. At that point Harte decided to remain and distribute dissident literature to the members. On that day, as set forth above, Ford threatened to have Harte beaten up if he distributed any more literature.

The next day, January 26, 1983, Harte asked McMurray to accompany him to the hall, in view of his being threatened the day before. They spoke to Tom O'Kelly, Respondent's Financial Secretary, and asked to see the job list. O'Kelly replied that

---

[15] Respondent's record shows that Clarke had called in on 10/13 to place his name on the list.

he could not show them the list. McMurray and Harte then began to again distribute literature. O'Connor then came out and told them to leave the hall and stop giving out literature or he would call the police. At that point McMurray took out a camera and took a picture of O'Connor. McMurray explained that he originally took the camera with him in case there was any violence, he would be able to record it, since Harte had informed him of the threat by Ford the day before. Although admittedly O'Connor did not engage in any violence on January 26, and merely ordered them to leave, McMurray testified that he decided to take a picture of O'Connor any way, since it might eventually be useful for their dissident publications.

McMurray and Harte again went to the hall on February 9 and asked O'Connor to see the job list. O'Connor again refused. Shortly thereafter, in mid-February 1983, Harte and McMurray after consulting with an attorney, sent identical letters to Respondent in care of McGuiness. The letters read as follows:

> I am a member of Carpenters' Local 608, UBC&J, and I seek work through its job referral procedures. I have good faith reason to believe that I have been and am being discriminated against by Local 608 in job referrals.
>
> In order to determine whether I have been or am being discriminated against, I seek information concerning the identity of persons on the Local 608 job referral list(s), and of the persons who have been referred to jobs, as well as the dates the persons who have referred to jobs, as well as the dates of referral, dates of hire, and dates of last preceding discharge.
>
> Please forward to me by return mail the names, addresses and telephone numbers of all persons who, during the past six months have asked to be referred to jobs by Local 608 or have asked that their names be placed on a list for job referral, together with:

(a) the date or dates of each request;

(b) the date or dates of each subsequent referral of such person to a job, including the name of the person so referred, the name of the employer to whom referred, and identification of the jobsite to which referred;

(c) the date or dates of each hire and of any subsequent layoff or discharge, including the name of the person hired and/or laid off, the name of the employer and identification of the jobsite.

I shall of course be prepared to pay a reasonable cost for reproducing the information requested.

By identical letters dated February 24, 1983, McGuiness replied to Harte and McMurray, asking them to contact McGuiness in order to set up a meeting, "so that we may review documentation that may be appropriate to your inquiry."

On April 6, 1983 a meeting was held pursuant to these letters. Present were McGuiness, McMurray and Harte. They asked McGuiness to see the job list. McGuiness took out and showed them their work cards, and explained that they showed that the men had received their fair share of work. McMurray responded that he objected to the accuracy of the cards, claiming that he was home on days that showed he had been called. McMurray again insisted on seeing the job list, which is required by the contract.[18] McGuiness repeated that McMurray had gotten a fair shake at the hall and that he was working steady, and that he would not be shown the job list. McGuiness did not mention anything about any of the job records or any part thereof being confidential. The meeting then ended.

The very next day McMurray received a call from John F. O'Connor offering him a job at LaGuardia Airport. McMurray refused this job, telling O'Connor that it was not a

[18] The contract as noted requires the Union to "establish and maintain an open employment list."

"finishing" job, which was his speciality, and that he also had no transportation to the Airport.

On or about February 23, 1983, Clarke was called by John Boyle from Respondent and offered a finish job, although his speciality is ceiling work. Clarke refused this job, since he did not have any finish tools. That very morning however, Clarke had been told by a fellow member, that he plus four others were dispatched from the hall that morning for ceiling jobs.

In mid-March Clarke, who was not working at the time, went to Respondent's office and asked John F. O'Connor to see the list. O'Connor responded that Clarke couldn't see the list, and the conversation ended.

In May of 1983, Clarke ascertained that a Company called Duncan Interiors was hiring employees. He then called the Company, and was told the Company needed a good mechanic such as Clarke, and would hire him, but that he had to get approval from the hall. Clarke then called Respondent and informed John F. O'Connor of his conversation with the Duncan official. O'Connor replied that Respondent had already dispatched two men to that job. Although Clarke admitted that he had just been laid off from another job, and had not as yet placed his name on Respondent's list, he still felt that this was his job and he was being circumvented by the Union; and that he felt his rights to get his own job from management was being restricted.[17]

Therefore Clarke went to the hall to try to find out who was sent out in his place to Duncan. He saw McGuiness and complained that he was being "put upon", and was unhappy about the fact that he was told that he needed clearance from Respondent to obtain a job he had gotten on his own. McGuiness explained that the Employer had already called in for men and that Respondent had dispatched two men to that job. Clarke then asked to see the job list to ascertain who had been sent

[17] I note that the contract provides that 50% of the jobs at a jobsite can be filled by management.

out in his place. McGuiness refused to show Clarke the list nor tell him who had been sent out to this job.[18]

The above findings with respect to the various requests to see the job referral lists of Respondent by the charging parties, is based on a compilation of what I believe to be the credible testimony of the charging parties and Respondent's witnesses, O'Connor and McGuiness. While much of the evidence is essentially undisputed and agreed upon, there are some areas where conflicts in testimony do exist. For the most part I have credited the testimony of the charging parties over that of Respondent's witnesses where it was necessary to resolve such conflicts. On balance I found the charging parties to be more candid and credible than Respondent's witnesses.

I was most impressed with charging party Clarke, who appeared to me to be the most believable of all of the witnesses herein, and who freely admitted facts which might adversely affect his position. Thus for example he divulged that he had not signed up on Respondent's hiring hall list when he made his request to see the list in May of 1983.

On the other hand I was most unimpressed with McGuiness as a witness, who was frequently evasive and argumentative in a number of his responses. This was true in some particularly significant areas of his testimony, such as whether Respondent had a policy in regard to permitting members to see the job referral lists.

Respondent defends its decision not to show the referral lists to the charging parties essentially through the testimony of McGuiness and Boyle. These explanations related specifically to the requests made in writing and orally by Harte and McMurray in February and April 1983, as McGuiness denied that any

---

[18] I note that Clarke had no way of knowing whether the men who had been sent out to this job were on the hiring list as contended by Respondent, nor whether the 50-50 ration set forth in the contract was being adhered to with respect to these referrals.

similar requests were made at other times.[19] O'Connor who also testified on behalf of Respondent admitted that in October 1982 and February 1983, he received requests from Harte and/or McMurray to see the referral lists, that he showed them then work cards instead, and that he would not show them the lists. O'Connor testified that he refused to show them the list although he had not discussed the matter with McGuiness, nor was he aware of any Union policy with respect to such requests. When asked why he did not show the list to a charging party, O'Connor's response was "his card was sufficient."

Insofar as McGuiness and Boyle are concerned they corroborate each other's testimony that after the February letters of Harte and McMurray were concerned, McGuiness instructed Boyle to bring in their individual worksheets, as well as requesting District Council Fringe Benefit reports. Based upon their review of these documents, Boyle and McGuiness testified that they concluded that Harte and McMurray had both received their fair share of work from Respondent. McGuiness also allegedly mentioned that he felt that the telephone numbers of members were confidential. McGuiness then decided that the men would not be allowed to see the referral lists. McGuiness asserts that in his view Harte and McMurray had been "working steady" for the six month period for which they requested information, and further that Respondent has a policy of confidentiality as to addresses and phone numbers. Accordingly, he states that he concluded that the requests made were unreasonable and they would not be shown Respondent's records.

During this discussion and McGuiness' deliberations, Boyle and McGuiness did not check the work cards or District Council records of any other members, nor did they go through the sign in or referral lists. McGuiness also testified that there was no "Union" policy with respect to requests to see the lists by

---

[19] As noted I have credited the charging parties that a number of other oral requests were made to various officials of Respondent, including McGuiness.

members, and that no one had ever made such a request before.[20] According to McGuiness, members will frequently come to the hall and ask how they stand on the list, but they are satisfied by Respondent's officials showing them their individual work cards, as was done with respect to the requests herein. McGuiness could not explain how the showing of members their own cards in any way shows how they stand on the list. When asked about this McGuiness then opined that when members make such requests, they are only interested in making sure that there is a record that they called in to the hall.[21]

Insofar as the confidentiality issue is concerned, McGuiness asserts that he became aware of the Respondent's policy against disclosure of members names and addresses when he was told about it in 1967 by another Union official. He claims that has always been the Respondent's policy as far as he knows. However he could not point to the policy being in writing. At one point in his testimony he asserted that Respondent's Constitution sets forth this policy. When pressed further, McGuiness referred to Section 31 of the constitution which relates only to the election procedure of Respondent, and states that qualified candidates shall be permitted to examine membership lists containing names and addresses of members once within thirty days prior to the election.[22]

It is undisputed that Respondent's policy in regard to elections is not to permit unlimited inspection of membership lists.

---

[20] With the exception of one retired member, which resulted in a prior NLRB charge and a settlement.

[21] McGuiness admitted however that at times members will be interested in finding out how many people are ahead of them on the list, and that business agents will sometimes furnish that information to the member.

[22] This provision appears to be in compliance with and in response to Section 401(c) of the LMRDA, which requires unions in election campaigns to comply with all reasonable requests of candidates to distribute mail and literature, and that candidates have a right once within 30 days prior to an election to inspect membership list.

The candidates come to the office with their literature, Respondent orally gives them the names and addresses of members, they put them on the envelopes and Respondent's officials accompany the candidates to the Post Office. When McMurray was running for business manager against McGuiness, he met with the election committee pursuant to this procedure. McMurray admitted that he read out loud the names and addresses of members into a hidden tape recorder that he had with them at the time, in order to obtain that information.[23]

Extensive testimony was adduced by Respondent of the charging parties concerning their work records during 1982 and 1983. Additionally, a stipulation concerning this information was also introduced into the record. Respondent also submitted into evidence its work cards and the District Council pension sheets.

The above evidence tends to establish that during the time periods in question herein, more specifically from the summer of 1982 through the spring of 1983, all three charging parties were working for a significant amount of the time. Each of them received a number of referrals from Respondent during this period of time, as well as obtaining a number of jobs on their own. However these records and this testimony do not dispute, and in fact tends to corroborate the testimony of the charging parties that for the most part, when they made their requests to see the lists, they were not employed and had been awaiting referral from the hall.[24]

---

[23] The date of this incident is not clear from the record, but it appears to have been at some point shortly prior to the election which was held on June 20, 1983.

[24] I note in this connection that Clarke admitted that he had not called the Respondent in May 1983 when he requested to see the list, but he had been denied a job that he thought he was entitled to receive. McMurray also admitted that he was working in late January 1983, when he accompanied Harte to ask to see the list, pursuant to Harte's request, because Harte had been threatened the day before by Ford. Harte as noted, on the other hand was not working on these days and was awaiting referral.

III. Analysis

A. The Exclusivity of the Hiring Hall

Respondent contends that its hiring hall herein is non-exclusive in nature, because in order for such an arrangement to be considered exclusive, "all" hiring authority must be reserved to the Union. I do not agree.

It is well settled that a hiring is deemed to be exclusive where the Union retains exclusive authority for referrals for some specified period of time such as 24 or 48 hours, before an Employer can hire on its own. *Mountain Pacific Chapter*, 119 NLRB 883 (1957); *Boilermakers Local Lodge 587 (Stone and Webster)*, 233 NLRB 612, 614 (1977); *Local No. 78, United Brotherhood of Carpenters (Murray Walter)*, 1223 NLRB 733, 734,5 (1976). Thus to the extent that that Union retains such exclusive authority during this period, it operates an exclusive hiring hall.

Similarly, an exclusive hiring hall can also exist where an employer has the contractual right to bring in a certain number or percentage of employees onto a job. *Bricklayers Local 8 (California Conference of Mason Contractors Association)*, 235 NLRB 1001, 1003 (1978). Thus the Employers herein have given up and delegated to Respondent the right to hire the first employee on the job and fifty percent of the remainder after the Employer selects a second employee. I conclude that to such an extent an exclusive hiring hall is contemplated by the Agreement. *Heavy Construction Laborers Local 663, AFL-CIO (Robert A. Trenner)*, 205 NLRB 455, 456 (1973).[25]

Since the record is bereft of any evidence that the terms of the contract have not been adhered to, I conclude that to the extent specified, Respondent operates an exclusive hiring hall.

---

[25] See also *Carpenters Union Local #25 (Mocon Corporation)*, 270 NLRB #110 (1984), where up to 25% of the employees could be designated by the Employer.

and is subject to the obligations and requirements which flow from such a finding.[26]

B. The Obligation to Permit Inspection of and Supply Information Regarding Respondent's Referral Records

It is well settled that a Union which operates an exclusive hiring hall, breaches its duty of fair representation in violation of Section 8(b)(1)(A), when it arbitrarily denies requests of its members for job referral information, where such requests are reasonably directed towards ascertaining whether such members have been properly treated in connection with the operation of said hiring hall. *Local 324, International Union of Operating Engineers, AFL-CIO (Michigan Chapter Associated General Contractor of America)*, 226 NLRB 587 (1976); *Bartenders and Beverage Dispensers' Union, Local 165 (Nevada Resort Association)*, 261 NLRB 420 (1982); *International Brotherhood of Electrical Workers Local 575 (Coleman Electric)*, 270 NLRB #20 (1984), ALJD p. 10, 11.

The Board has found violations with respect to the denials of various types of requests in this connection, such as inspecting the hiring hall lists,[27] copying the lists,[28] or even asking the Union to compile and furnish hiring hall information.[29]

Even where a Union operates a non-exclusive hiring hall, the Board has found that the Union still owes a duty of fair representation towards those who seek to utilize its services. *Bricklayers'*

---

[26] The testimony that a majority of Respondent's members do not use the hiring hall at all, and obtain jobs on their own, in no way refutes or contradicts this finding.

[27] *Bartenders Local 165, supra; Fischbach Lord Electric Co.*, 270 NLRB #125 (1984), ALJD at p. 15.

[28] *Local 513, Plumbers (Mechanical Contractors Association of Grand Rapids)*, 264 NLRB 415, 422 (1982); *Local 90, Plasters (Southern Illinois Builders Association)*, 236 NLRB 329, 338 (1978); *Boilermakers Local Lodge 587, supra.*

[29] *Local 324, supra; Local Ohio Valley District Council of Carpenters (Axley and Burch and Lomb Co.*, 255 NLRB 80, 87 (1981).

and Stonemasons' Union Local 8, supra. at 1005-1008; *Local 13, Plumbers' (Mechanical Contractors Association of Rochester)*, 212 NLRB 477, 479 (1974); *Crouse Nuclear Energy*, 240 NLRB 300 (1979).

This duty has been held to have been violated where the Union in an non-exclusive hiring hall discriminatorily refuses its members access to and services of the hiring hall because they have engaged in intra union political activity. *Hoisting and Portable Engineers Local 4 (Carlson Corp.)*, 189 NLRB 366 (1971); *Chauffeurs Union Local 923, IBT (Yellow Cab Co.)*, 172 NLRB 2137 (1968); *Crouse Nuclear, supra.*

The Board has also found the duty of fair representation to have been violated where the operator of a non-exclusive hiring hall refused to permit the utilization of said hiring hall, because of other arbitrary reasons, such as the fact that the applicant was not a union member or because he worked for a non-union contractor, *Local 13, Plumbers, supra*, or because of his non-union status and because he refused to pay a fine to a sister local. *Bricklayers Local 8, supra.*

In the instant case the evidence is more than sufficient to support a finding that the various requests of the charging parties herein were denied, because of activities in opposition to the policies of Respondent and its incumbent officials including their reelection.

The record is clear that all of the charging parties ran or attempted to run for Union office against Respondent's incumbent officials, spoke out at Respondent's meetings, and distributed literature to the membership highly critical of the operation of Respondent in general, and the current leadership in particular.

That Respondent and its officials harbored substantial animus towards the exercise of these protected concerted activities by the charging parties cannot be doubted. Thus at Respondent's October 18 meeting, immediately after McMurray made a critical comment about Respondent's assessment policy,

McGuiness obtained the floor and proceeded to attack the literature distributed by the charging parties as well as the charging parties themselves. McGuiness referred to them as "a small group or minority that is printing garbage and passing it out." He also characterized the publications as "deliberate lies and indecent pieces of literature", and asked the members "to ignore this garbage if you have any decency at all." He concluded by asking the membership not to "be like this small minority group, do not lower yourself to their class."

I would note that this diatribe took place at the same meeting during which McMurray asked about the job list and was told by McGuiness that the Local does keep a list and that any member could see it any time that they wanted. The very next day, as noted Clarke, McMurray and Harte all came to the hall, requested to see the list and were refused, without being given a reason by Respondent.

Additionally at another meeting on February 28, 1983, McMurray raised a question about the list, and was told angrily by John J. O'Connor that since he had filed charges against Respondent with the NLRB, and that Respondent would not answer any questions about the job list. McGuiness then commented that members who bring charges at the Labor Board cost the Local money. Later on in the same meeting, after McMurray criticized the salaries of business agents, John J. O'Connor interrupted and referred to McMurray as an "ungrateful bastard" and refused to allow him to continue speaking. Finally, O'Connor observed that Harte and McMurray had brought NLRB charges and that they were "bastards trying to destroy the Union".

I note that these remarks on February 28, 1983 were contemporaneous with both oral and written requests by the charging parties to see the lists and obtain hiring hall informataion.

Finally, on January 25 and 26, after having been again refused access to the job lists, Harte began to distribute dissident literature to members. On the 25th he was threatened by Ford with being beaten up if he did not desist. On the 26th, along

with McMurray, they were both told by John F. O'Connor that they would be arrested if they continued distributing literature to members.

Thus, the above evidence of animus towards the charging parties for their protected activities, coupled with the fact that McGuiness at the October 18th meeting told the membership that Respondent's job list is available to be seen at any time, leads to the conclusion that the charging parties were treated disparately and discriminatorily with respect to their requests for hiring hall information.

It would seem therefore that the issue of whether or not Respondent operates an exclusive hiring hall, is not crucial to the disposition of the instant matter. What is crucial and in my judgment determinative of the issue of the legality of Respondent's conduct herein, are the questions of the reasonableness of the charging parties' requests, and the validity of Respondent's professed reasons for denying these requests. Indeed as Respondent correctly observes, the Act does not impose an absolute obligation to comply with the requests for hiring hall information in all circumstances. *Local 324, supra*, in fact makes it clear that a Union must merely "deal fairly with an employee's request for information."

Respondent cites *Detroit Edison Co.*, 440 U.S. 301 (1979), the Supreme Court opinion on the duty of Employers to supply information to Unions, and urges that the situation is analogous to the instant matter. Thus Respondent urges an adoption of the "balancing test" of conflicting interests set forth therein, and argues that the interest of the charging parties in obtaining the hiring hall information herein, can and should be outweighed by various legitimate interests of Respondent. While I am not persuaded that the analogy to *Detroit Edison, supra* is necessarily apt, I do find some similarities in the rationales and the underlying considerations in both situations. I also believe that the admonition in *Local 324, supra* to "deal fairly" with requests for hiring hall information presupposes some sort of balancing test between the necessity for the

information and the possible legitimate and compelling interests that a Union may have in denying the requests.

I now turn to an examination of these issues. The initial question to be decided is whether the requests of the charging parties had a reasonable basis. I credit the testimony of the charging parties that they requested to see the job lists because they reasonably believed that they were being discriminated against by Respondent in the operation of its hiring hall. In this connection I note that the evidence discloses that nearly all of the requests were made, when the charging parties were unemployed and awaiting referral from the hall, while at the same time Respondent's officials were announcing 100% or plentiful employment among the membership. McMurray and Clarke were both offered referrals by Respondent outside of their respective specialties, contrary to Respondent's normal practice of referral by specialty. In Clarke's case this referral by Respondent raised even more suspicions in his mind, by virtue of the fact that on the very day that he was offered the job outside his specialty, he was told that Respondent on the same day had referred five men to jobs in Clarke's specialty. Thus I find it quite reasonable for Clarke to have concluded from these facts, that the referral to him by Respondent outside his specialty was offered knowing he would refuse, and was an attempt to circumvent him on the list and not to offer him jobs in his specialty that it gave out to others on that day. Thus it was quite reasonable for him to request to see the list, and find out who had been referred to the ceiling jobs on that day, and where these members stood on the list in relation to him.

Additionally I note that Clarke lost a job that he thought he had obtained on his own, after having been told by the Employer that he needed only clearance from the hall to work. When Clarke called the Respondent to ask about this job, he ws told by O'Connor that two men had already been referred from the hall to that job. It may very well be true that Respondent had, as testified to by O'Connor, already sent out the two men, prior to Clarke having called. However, that it not the issue. Once again these facts certainly could provide Clarke and

I find that it did, a reasonable belief that he was again being circumvented by Respondent. Thus the official at Duncan apparently said nothing to him about having already called the hall, and clearly led Clarke to believe that he needed only to receive Respondent's approval to obtain the job. When he was told by O'Connor that men had already been referred, it certainly could have raised suspicions in his mind, that once again he was being treated unfairly, and that perhaps no one had been dispatched until after his interest in the job had become known. Thus when he asked McGuiness to see the list to verify who had been sent out in his place, he clearly had a reasonable basis for the request.

I note also that the contract provides for a 50-50 ratio of job referrals, so that the referral of the two men, while denying the Employer the right to hire someone of his choice, may have violated the contract. This provides but another reason to justify Clarke's checking the referral lists.

Finally I agree with General Counsel's contention that the way Respondent operates its hiring hall herein, provides in and of itself additional support for the charging parties' beliefs. Thus contrary to prior practice, Respondent since 1979 has not utilized a shape-up or hiring hall where employees appear, sign a list and are dispatched. Persons seeking employment now sign up and receive referrals by phone, and consequently have no opportunity to ascertain who else may have been referred or in what order, and cannot determine whether referrals have been fairly distributed. The charging parties herein were constantly complaining about the unfairness of this system both in their literature and at meetings. In these circumstances I find Respondent's system itself was supportive of the reasonable belief of the charging parties that they were being discriminated against in the operation of the hiring hall by Respondent.

Respondent argues on the other hand, that the charging parties had no belief, reasonable or otherwise, that they were being treated unfairly by the Respondent's hiring hall, and that the real motive for their requests for hiring hall information,

was to obtain an additional outlet for their dissemination of campaign literature. Respondent contends initially that each of the charging parties during this period was working for much of the time. While that may be true, they were also out of work for sometimes long period of time,[30] while awaiting referrals, and while Respondent's officials were boasting about 100% employment of its membership. Moreover a number of the jobs received by the charging parties were obtained on their own. These jobs of course can aprovide no basis for disbelieving their testimony that they thought they were being treated unfairly, since Respondent had no role in referring these jobs to them. Indeed in one instance, as noted above, Clarke thought he had obtained a job on his own from the Employer, only to be told by Respondent that it had already filled these positions, which lends further support to Clarke's belief that Respondent may have been discriminating against him. I therefore find Respondent's reliance upon the fact that the charging parties were working for much of the time in question, to be misplaced, and far from sufficient to conclude that they were not acting in good faith when they made their requests.

Respondent also points to the fact that during the late January visits to the hall to request to see the list, Harte and/or McMurray distributed campaign literature, and on the second day McMurray took a photograph of O'Connor, admittedly for possible campaign use. Additionally, Respondent notes that McMurray who was running for office against McGuiness in the June 1983 election, admittedly circumvented Respondent's campaign rules with respect to disclosure of names and addresses of members, by tape recording this information without the knowledge or consent of Respondent. Finally, Respondent argues that the fact that both Harte and McMurray, the two leading dissidents, sent the identical letter to Respondent requesting the information, at relatively the same time during the heat of the election campaign, demonstrates that they lacked credibility in connection with their stated purpose. I do not agree.

---

[30] For instance McMurray was out of work from 1/31/83 to 4/15/83.

I note initially that the charging parties began making requests to see the lists from as far back as the summer and fall of 1982, well before McMurray began to run against McGuiness for Business Manager. I also do not believe that the fact that Harte and McMurray distributed literature on January 25 and 26 necessarily establishes that their requests to the list on that date were not made in good faith. They may have suspected based on prior events, that their requests would again be refused or put off, but I am still persuaded that they did believe they were not being treated fairly and wished to see the list in order to investigate whether their referral rights were being protected.

I attach little significance to McMurray's taking a picture of O'Connor, since he credibly explained that he brought the camera in order to photograph anticipated violence, based on Harte's being threatened the day before by Ford for distributing literature. The fact that he took the picture of O'Connor although no violence took place,[31] and admitted that he might use it for campaign purposes, is again far from sufficient to establish that the request for referral information was not made in good faith.

As for McMurray's secretive taping of names and addresses of members contrary to Respondent's regulations, it is clear that he intended to use the information for campaign purposes. However, the taping did not occur contemporaneously with the numerous hiring hall requests that he made, and has not adduced any other evidence to establish a connection between these events.[32]

---

[31] I note that O'Connor did threaten them with arrest for giving out literature.

[32] I find contrary to Respondent's assertions, nothing suspicious or damaging about the fact that Harte and McMurray sent identical letters to Respondent requesting hiring hall information at around the same time. They freely admitted using an attorney to prepare the letters, and the evidence is clear that both of them were out of work and awaiting referral at the time that they sent out their letters.

Respondent also contends that the good faith assertion by the charging parties of their belief that they were discriminated against was rejected by the Board itself, when it refused to issue complaint on the 8(b)(2) allegations made by the charging parties concerning the discriminatory implementation of referrals by the Union. I again do not agree. The record is silent as to what facts the Region evaluated in its decision, or the basis for its action. The Directors investigation serves a more limited function than the hearing necessary under the Act, and cannot therefore serve as a replacement for the Board's adjudicatory responsibility. *Hotel and Restaurant Employees' Union Local 274 (Hospitality Catering)*, 269 NLRB #86 (1984) Slip op. p. 5. Moreover, I note that the withdrawal of Harte's charge took place on May 9, 1983, subsequent to all of his requests. The record is silent as to the dates of the withdrawals of the other charges, but it appears that they were also subsequent to their requests to see the lists. Thus the disposition of the 8(b)(2) portion charges is not determinitive even as to the issue of whether in fact Respondent discriminated against the charging parties in referrals, much less as to whether they believed that they were discriminated against or treated unfairly by the Respondent's hiring hall. Moreover, in my view, the belief that the charging parties need have, that they were treated unfairly, need not rise to the level of discrimination which would be unlawful under the Act in order to justify their requests to see hiring hall records.

Finally, I am of the opinion that the written requests for information made by Harte and McMurray were also neither overbroad nor burdensome. The charging parties had been denied access to the job lists for months without any explanation by Respondent. Thus the request for information for a six month period was appropriate. No evidence was submitted by Respondent that the request would create any significant burden in compiling the information sought by the charging parties.

As for the request for addresses and phone numbers, they credibly testified that they wished to be able to verify whatever information they might be given from Respondent's records.

This appears to be a reasonable concern,[33] particularly where as here Harte and McMurray both questioned the reliability and accuracy of their work sheets kept by Respondent and previously shown to them instead of the records that they sought.

Additionally, I would note Clarke's unrefuted testimony that some jobs dispatched by Respondent, to an empty building for example, are likely to be and usually are of longer duration. Sometimes jobs can last up to two years. Clarke also testified that he never has been dispatched by Respondent to any job that lasted a year or more. Since the duration of jobs is not included on any of Respondent's hiring hall records, members cannot ascertain this information from merely inspecting the records. Thus is would be necessary to contact the employees sent out on jobs, in order to determine how long each dispatch lasted. Therefore this provides but another reason for the charging parties to request addresses and phone numbers, so that they could find out whether they were being discriminated against in assignments with respect to job duration.

Moreover, even if it were concluded that an additional purpose of some or even all of the various hiring hall requests made by the charging parties, was to use the information for campaign purposes, Respondent would still not be privileged to deny their requests, as long as the requests were also, as I have found, based on and motivated by a reasonable belief that they were being discriminated against in the hiring hall. Analagyzing, as Respondent itself urges, to the *Detroit Edison*, *surpa* type situation, the Board has held that where a union's request of an employer for information has a legitimate purpose, the fact that it may desire to use such information for organizational or campaign purposes, does not provide a defense to an employer's refusal to supply such information.

Thus, "it is well established that where a union's request for information is for a proper and legitimate purpose, it cannot

---

[33] See *Local 324*, *supra*, where this concern was advanced by the charging party, and the Board found the request for addresses and phone numbers to be appropriate.

make any difference that there may also be other reasons for the request or that the data may be put to other uses." *Associated General Contractors of California*, 242 NLRB 891, 894 (1979).[34]

Respondent raises several other defenses to its refusal to permit access by the charging parties to its records. Preliminarily it argues that any Board order requiring Respondent to furnish hiring hall information which encompasses disclosure of names and addresses of union members is contrary to the Labor Management Reporting and Disclosure Act of 1959. Respondent specifically refers to Section 401(C) of that Act, which sets forth requirements for the disclosure of members names and addresses in an intra-unon election campaign, and argues that this establishes that "Congress in 1959 chose to allow unions in all instances to determine whether or not its membership lists would become available for public use." Thus Respondent contends that the LMRDA proscription against disclosure supercedes any rights under the NLRA.

I find Respondent's position on this issue to be without merit. The section of the LMRDA cited by Respondent, merely regulates intra-union election campaigns in connection with disclosure of membership lists to candidates, and even at that, does not prohibit a union from granting more extensive disclosure than the statute requires.

Particularly since the overall purpose of the LMRDA is to protect rank and file members from potential abuse by union officials,[35] it cannot reasonably be construed to prohibit a union from disclosing membership information to its members in

---

[34] See also *Columbus Maintenance and Service Co., Inc.*, 269 NLRB #37 (1984), where the Board in affirming an ALJ's finding a violation in an employers refusal to supply phone numbers of unit employees to a union, stated as follows: "As the Union's request was related to its role of bargaining representative, and not solely to its campaign needs, we agree with the judge's conclusion that Respondent violated Section 8(a)(5) and (1) by refusing to supply the requested telephone numbers." *Id.* Slip op. p. 2.

[35] *Marshall v. Local Union 478, Laborers' International Union*, 461 F. Supp 185, 188 (1978).

appropriate circumstances. Clearly the intent of the statute is to provide a minimum amount of disclosure in an election campaign, not to prevent a Union from doing so, or authorizing a Union to decline to do so in appropriate situations.

Finally, in this connection I note the ALJ's decision in *Local 324, supra*, where he observed that he did not construe various provisions of the LMRDA as "delimiting the scope of a union's obligations to furnish information to the employees it represents." *Id.* at 599.

Respondent also contends that in applying the balancing test set forth in *Detroit Edison, supra*, that it carefully and in good faith evaluated the legitimacy of the charging parties' requests, balanced them against legitimate union interests, and reasonably refused the requests.

Respondent relies on the testimony of its officials, Boyle and McGuiness, that after receiving the written requests from McMurray and Harte in February of 1983, they reviewed the members work cards and District Council Fringe Benefit reports, and concluded that both Harte and McMurray had been working steadily for the six month period covered by their requests for hiring hall information. This evidence allegedly convinced McGuiness that Harte and McMurray had not been treated unfairly in connection with referrals, and that they had no reason to see the records, particularly since the disclosure of names and addresses of members allegedly violated a long standing union policy of confidentiality of this information.

I find the Respondent's arguments, as well as McGuiness' testimony far from convincing. Firstly, these explanations do not account for Respondent's numerous other denials of the previous and subsequent oral requests to see the job lists made by Harte, McMurray and Clarke. These denials occurred in the summer of 1982, October 1982, and January 1983, all before Respondent made its alleged evaluations of the propriety of Harte and McMurray's written requests in February 1983. Moreover, no testimony was adduced that any such evaluation

was made of Clarke's work history, while he was also denied access to the job lists on a number of occasions, even as late as May 1983, after the incident with the Duncan job that he had lost.

Secondly, even as to Harte and McMurray's written requests, the testimony of Respondent's witnesses is not persuasive. They claim that their review of the records of Harte and McMurray convinced them that the members had been working steadily and were therefore treated properly by the hiring hall. However it was admitted that Respondent's officials did not examine its referral or shape-up lists, nor examine work sheets of other members. It was clear that the complaints of Harte and McMurray as well as Clarke, asserted that they believed other members may have received referrals which should rightly have gone to them. Thus, it is essential to compare the records of other members with the charging parties, in order to make a reasonable evaluation of their claims.[38] The failure of Respondent to do so, detracts substantially from the reliability of McGuiness' testimony and Respondent's contention, that it reasonably viewed the charging parties' claims as lacking in substance.

In any event, in my judgment it is not the function of Respondent to evaluate the merits of the charging parties' asserted contentions. Analagyzing once again to the *Detroit Edison*, *supra*, type of information request, as Respondent urges, the Board has consistently held that the merits of the Union's underlying grievance is not significant, and that an employer cannot comply with its obligation to disclose information by making its own evaluation of the information requested, and concluding even if in good faith, and/or correctly, that the grievance is nonmeritorious, and/or the information is not essential to the union's decision making functions. *Associated General Contractors*, *supra*, p. 894. See also *Conrock Co.*, 263 NLRB 1293, 1294

[38] I note that although the charging parties did receive some referrals from Respondent during the period in question, they also obtained a number of their jobs on their own.

(1982); *Herk Elevator Maintenance Inc.*, 197 NLRB 96, 97 (1972).

Thus the charging parties are entitled to judge for themselves herein whether their hiring hall rights have been violated and need not be satisfied by Respondent's investigation of their claims.[37]

Turning to the Respondent's allegation that its need for "confidentiality" with respect to phone numbers and addresses justified its refusal to disclose the information, I find this contention to be entirely specious and pretextual, and insufficient in any event to provide it with a defense herein. Respondent's various officials, including McGuiness, who denied the numerous requests for hiring hall information by the charging parties, never at any time mentioned to them that confidentiality was a reason for its actions in denying the requests.[38] Indeed the oral requests made by the charging parties, contained no reference to addresses or phone numbers. Furthermore McGuiness seems to be the only official of Respondent who was aware of this well known policy of "confidentiality". His testimony that he became aware of it when informed years ago by a Union officer who has died since, lacks credence. Admittedly, the policy has never been memorialized in any writing, or in Respondent's Constitution or By-laws.[39]

Most significantly, John F. O'Connor, one of Respondent's business agents and actively involved with hiring hall procedures, was obviously unaware of this alleged "policy", since he never mentioned it in his testimony as a reason for denying

---

[37] Indeed it may very well be that the information disclosed may have satisfied the charging parties that they were being properly treated. See *Local 324, supra.* 598.

[38] See *McDonnell Douglas Corp.*, 233 NLRB 881, 890 (1976).

[39] McGuiness' attempt to establish that the policy is in writing, by pointing to the Constitutional provisions dealing with elections is equally unconvincing. Clearly this provision is merely in compliance with the LMRDA's requirements and does not reflect any Union policy of confidentiality.

any of the requests made to him. In fact when asked, O'Connor stated that he was unaware of any Union policy with regard to disclosure of this type of information, and that he refused to permit it, because he felt that the charging parties' work sheets were sufficient for their inquiries.[40] Moreover, the belated partial corroboration of Boyle on this issue, came only as a result of leading questions, and at that only referred to McGuiness mentioning to him confidentiality as to phone numbers, and not addresses, as a factor in McGuiness' decision to refuse to disclose the information to charging parties Harte and McMurray.

Thus, I conclude that McGuiness' assertion of confidentiality as a reason to refuse the requests, was an afterthought conjured up by Respondent after the fact to attempt to justify its discriminatory actions against the charging parties.[41]

Assuming arguendo, that the confidentiality defense had in fact been considered by Respondent in its decision, it has still fallen far short in meeting its burden of establishing the validity of such a defense. Thus when a claim of confidentiality is raised, the party asserting that claim has the burden of proof. *Pfizer Inc.*, 268 NLRB 918, 919 (1984).

Respondent in relying on *Detroit Edison, supra*, claims that Respondent has "unequivocally established that the information sought has always been treated with the highest degree of confidentiality." This is a gross mischaracterization of the record. Indeed as I have found above, this "policy of confidentiality" seems to have only been known to McGuiness, and no other

---

[40] This assertion is of course preposterous, since their work sheets do not show records for other members, nor where the charging parties stood in relation to others, which was obviously their true concern.

[41] I note also in this connection my findings above that McGuiness affirmatively stated at a Union meeting that the Respondent's referral and sign in lists were available for anyone to see. Thus it would be unlikely for him to have made such a statement, if a policy of confidentiality had been in existence which would have prevented such lists from being inspected.

officials such as O'Connor. As for telephone numbers and addresses, McGuiness testified that he felt that a lot of people have unlisted numbers, and do not want other people to know where they live and they are entitled to that privacy. However, this unsubstantiated and unsupported testimony has no probative value herein. Respondent has not established the basis of McGuiness' feelings in this regard, and in fact has not even proven that there are any members who even have unlisted numbers, much less that they have expressed a desire for privacy.

Thus, contrary to *Detroit Edison, supra.* where the Employer therein had promised the employees that it would keep the information requested by the Union to be confidential, there is no evidence herein that the alleged policy of confidentiality was disseminated to employees, or that any employees sought to have the information kept confidential,[42] or that the employees had an expectation that this information would be kept confidential.[43]

Moreover, the Board has rejected the argument that phone numbers and addresses are "confidential" in the context of a request for hiring hall information. *Local 324, supra; Local 165, supra.* Indeed if Respondent were truly concerned about the members' rights to privacy, it could have offered to release only the information with respect to those members who have unlisted numbers. Or it also could have offered to furnish the information requested aside from the names and addresses. It is noted that in this connection that Respondent's referral list contains neither the members phone number nor address. Yet Respondent made no such alternative offers. This is but another indication of Respondent's arbitrary conduct.[44]

---

[42] *Salt River Valley Users' Assoc.*, 272 NLRB -53 (1984(A.L.J.D. slip op. p. 10; *Pfizer, supra.* at 919.

[43] *Pfizer, supra.*

[44] See *Local 324, supra.* at 598.

In summary, I have concluded above that the charging parties requested inspection of Respondent's hiring hall lists and the furnishing of various items of information in regard thereto, based upon a reasonable belief that they were being treated unfairly by Respondent in its operation of the hiring hall. I have also found that Respondent refused to comply with these requests, (1) for discriminatory reasons, because of the charging parties' having engaged inprotected concerted activities, and (2) arbitrarily and without legitimate justification in breach of its duty of fair representation. By this conduct Respondent has violated Section 8(b)(1)(A) of the Act, and I so find.

Conclusions of Law

1. The Associations, and its employer-members, are employers engaged in commerce within the meaning of Section 2(5) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By denying John Harte, Franklin McMurray and Euguese Clarke the right to review and inspect hiring hall records maintained by Respondent, and by refusing to supply them with information with regard to the operation of its hiring hall, Respondent has breached in duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take affirmative action designed to effectuate the purposes and policies of the Act.

Respondent argues in this connection, that no affirmative relief is appropriate, since at this point in time no reasonable

need exists to furnish the information. Respondent cites *Local 324, supra.* where the Board affirmed the Administrative Law Judge's recommended order which did not provide for any affirmative relief. Again Respondent refers to the Regional Office's decision on the 8(b)(2) charge having now precluded the existence of any current need for charging parties to have access to the information requested.

Contrary to Respondent's position, I am persuaded that affirmative relief is appropriate in the circumstances herein. As noted above, I attach little significance to the Region's refusal to issue an 8(b)(2) complaint, since no hearing has been held with respect to these issues. As also noted, I do not believe that charging parties' belief of unfair treatment must rise to the level of discrimination under the Act, to warrant their satisfying themselves that they have been treated properly. While it is true that the events justifying charging parties' reasonable belief occurred in 1982 and 1983, I do not think it would be inappropriate to even now require disclosure of information relating to that period of time.

It is true as Respondent points out, that in *Local 324, supra,* the ALJ found, in agreement I would note with the position of General Counsel, that disclosure of the information would be useless to charging party at the time, and recommended only a cease and desist order. However, since the General Counsel did not dispute and apparently did not except to this order, the precedential significant of this aspect of the case, is somewhat dubious.

More to the point, and more dispositive with respect to this issue is *Local 165, Bartenders, supra,* a more recent case, where the ALJ affirmed by the Board, ordered Respondent to affirmatively honor requests by the charging party to review and inspect hiring records. See also *Local 1080, Carpenters, supra,* where the Board also ordered Respondent affirmatively to make hiring records available to referral applicants.

Finally I also note in this connection that I have concluded that Respondent discriminatorily denied the charging parties access to its hiring hall records, because of their engaging in dissident intra-union activities. This also militates in my view, in favor of ordering affirmative relief against Respondent.[45]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[46]

Carpenters Local 608, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Denying employees whom it represents in collective bargaining, the right to review, or inspect hiring hall records, or refusing to provide such employees information upon request with regard to the operation of its hiring hall, where such information or request is related to an alleged failure to properly refer such employees, because said employees engaged in intra-union political activities or other protected concerted activitaies.

(b) Arbitrarily denying employees whom it represents in collective bargaining, the right to review or inspect hiring

---

[45] This is not to say that any future request by charging parties or other individuals for hiring hall information with respect to other periods of time must necessarily be granted. Any such requests must be evaluated with respect to their reasonableness, as well as the alleged reasons by Respondent for any future denials.

[46] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

hall records, or refusing to provide such employees information with regard to the operation of its hiring hall, where such information or request is related to an alleged failure to properly refer such employees.

(c) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Honor requests by Eugene Clarke, Franklin McMurray and John Harte to inspect or review hiring hall records, and provide such employees information upon request with regard to the operation of its hiring hall, where such requests are related to the alleged failure to properly refer such employees.

(b) Post at its business offices, hiring hall and meeting hall, copies of the attached notice marked "Appendix A".[47] Copies of the notice on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the said notices are not altered, defaced, or covered by any other material.

---

[47] In the event that the Board's Order is enforced by a Judgment of a United states Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Noticy the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated: Washington, D.C. March 26, 1985.

Steven B. Fish
Administrative Law Judge

Appendix A

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL IN WHICH ALL PARTIES PARTICIPATED AND WERE AFFORDED THE OPPORTUNITY TO PRESENT EVIDENCE IN SUPPORT OF THEIR RESPECTIVE POSITIONS, IT HAS BEEN FOUND THAT WE HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT IN CERTAIN RESPECTS AND WE HAVE BEEN ORDERED TO POST THIS NOTICE AND CARRY OUT ITS TERMS.

WE WILL NOT deny employees whom we represent in collective bargaining, the right to review or inspect our hiring hall records, or refuse to provide such employees information upon request with regard to the operation of our hiring hall, where such information request is related to our alleged failure to properly refer such employees, because said employees engaged in intra-union political activities or other protected concerted activities.

WE WILL NOT arbitrarily deny employees whom we represent in collective bargaining the right to review or inspect our hiring hall records, or refuse to provide such employees information with regard to the operation of our hiring hall, where such information or request is related to an alleged failure to properly refer such employees.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL honor requests by Eugene Clarke, Franklin McMurray and John Harte to inspect or review our hiring hall records, and provide such employees information upon request with regard to the operation of our hiring hall, were such requests are related to our alleged failure to properly refer such employees.

Appendix A-1

CARPENTERS LOCAL 608,
UNITED BROTHERHOOD
OF CARPENTERS AND
JOINERS OF AMERICA, AFL-CIO

(Union)

Dated_____ By_____

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office. 26 Federal Plaza, Rm. 3614, New York, New York 10278. Telephone No. (212) 264-0360

Appendix B

TRANSCRIPT CORRECTIONS

1. Line 16 on page 8 should read "jobs the hiring hall is exclusive."

2. Lines 3-6 of page 10 should be amended to read "And on several occasions, they have requested either they be shown the hiring hall lists or that copies containing information regarding the hiring hall procedure is to be turned over to them."

3. Lines 8-10 on page 10 should read "The hiring hall or job referral service operates through a call-in service system -- that is there is no shape-up before the men are sent out to work."

4. Line 12 on page 10 should be corrected to read "All that happens is someone who wants a job calls in . . ."

5. Line 15 on page 10 should be corrected to read "I think there is no shaping system."

6. Lines 17-18 on page 10 should be corrected to read "The only way that they would have to check to see who gets hired is the hiring hall records."

7. Lines 20-21 on page 10 should be corrected to read "Now its clear that a union owes a duty of fair representation to all its members."

8. Lines 22-24 on page 10 should be corrected to read "And it is Board law that it would be a violation of Section 8(b)(1)(A) of the Act for these members or any other members to be discriminated against."

FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1284

In the Supreme Court of the United States

OCTOBER TERM, 1988

CARPENTERS LOCAL 608, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board
Washington, D.C. 20570

14 pp

QUESTION PRESENTED

Whether it was appropriate for the court of appeals summarily to adjudicate petitioner in civil contempt of the court's prior judgment where the undisputed facts showed that petitioner had not complied with that judgment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Chaplain, In re, 621 F.2d 1272 (4th Cir.), cert. denied, 449 U.S. 834 (1980)	9
Florida Steel Corp. v. *NLRB,* 648 F.2d 233 (5th Cir. 1981)	9, 10
Groppi v. *Leslie,* 404 U.S. 496 (1972)	9
McComb v. *Jacksonville Paper Co.,* 336 U.S. 187 (1949)	9
NLRB v. *FMG Industries,* 820 F.2d 289 (9th Cir. 1987)	9
NLRB v. *Gentzler Tool & Die,* 126 L.R.R.M. (BNA) 3318 (6th Cir. 1987)	9
NLRB v. *Goodsell & Vocke, Inc.,* 645 F.2d 680 (9th Cir. 1981)	8-9
NLRB v. *Hickman Garment Co.,* 471 F.2d 611 (6th Cir. 1972)	9
NLRB v. *Holyoke Water Power Co.,* 793 F.2d 18 (1st Cir. 1986)	8
NLRB v. *Laborers Fund Corp.,* 124 L.R.R.M. (BNA) 2078 (9th Cir. 1986)	9
NLRB v. *Maine Caterers,* 654 F.2d 131 (1st Cir.), cert. denied, 455 U.S. 940 (1981)	9
United States v. *Sacher,* 182 F.2d 416 (2d Cir. 1950)	9
West Texas Utilities Co. v. *NLRB,* 206 F.2d 442 (D.C. Cir.), cert. denied, 346 U.S. 855 (1953)	8

Statutes:

Labor-Management Reporting and Disclosure Act of 1959 § 401(c), 29 U.S.C. 481(c)	3
National Labor Relations Act § 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A)	2

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1284

CARPENTERS LOCAL 608, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The adjudication in civil contempt (Pet. App. A6-A8) is unreported. The opinion of the court of appeals (Pet. App. A10-A19) enforcing the order of the National Labor Relations Board (the Board) in the underlying unfair labor practice proceeding is reported at 811 F.2d 149. The decision and order of the Board (Pet. App. A20-A22) and the decision and recommended order of the administrative law judge (Pet. App. A25-A67) are reported at 279 N.L.R.B. 747.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1988. The petition for a writ of certiorari was filed on January 30, 1989. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Carpenters Local 608, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Local 608), operates an exclusive hiring hall pursuant to collective bargaining agreements with various associations of employers engaged in the construction and building trades in New York City (Pet. App. A20 n.1, A28-A29). On April 30, 1986, the Board found that petitioner had violated its duty of fair representation under Section 8(b)(1)(A) of the National Labor Relations Act (29 U.S.C. 158(b)(1)(A)) by refusing to supply John Harte and two other Local 608 members with information they had requested in February 1983 regarding the operation of its hiring hall (Pet. App. A19).[1] The Board ordered petitioner, in pertinent part (*id.* at A21), to:

> Honor requests by Eugene Clark, Franklin McMurray, and John Harte to inspect, review, photocopy, or duplicate all hiring hall records (on payment of reasonable costs), and provide such employees information on request with regard to the operation of its hiring hall, where such requests are related to the alleged failure to properly refer such employees, including but not limited to those requests made by letter in February 1983.

On February 10, 1987, the court of appeals entered a judgment enforcing in full the Board's order. A petition for rehearing was denied on March 5, 1987 (Pet. App. A9), and petitioner then sought review by this Court, claiming that the disclosure and copying requirements of

---

[1] The information request, which sought the hiring hall's referral list and related records, was prompted by the employees' concern that they were being denied referrals because of their dissident union activities (Pet. App. A51-A52).

the Board's order violated Section 401(c) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481(c). While its petition for certiorari (No. 86-1760) was pending, petitioner refused requests by Harte for the information requested in his February 1983 letter and, although it had not sought or received a stay of the mandate from any court, informed Harte and the Board's Regional Office that it did not intend to comply with the court of appeals' order while its certiorari petition was pending. (NLRB Mot. for Summary Adjudication in Civil Contempt [Board Motion] 2 & Attachment A.).[2] The petition for a writ of certiorari was denied on October 5, 1987. 108 S. Ct. 72.

2. On October 27, 1987, petitioner sent Harte a letter (Board Motion, Attachment B) responding to his February 1983 request for hiring hall information. The letter advised Harte that before receiving the requested information he would have to "pay the Union at the current Carpenter hourly rate plus benefits, for each hour, or part thereof, spent in" complying with his request, and "15¢ per page for any photocopied materials." The letter further advised that Harte "will be required to pay the costs prior to having the material released."

By letter dated December 8, 1987 (Board Motion, Attachment C), the Board's Contempt Litigation Branch informed petitioner that, under the judgment of the court of appeals enforcing the Board's order, petitioner could not require Harte to make any payment in advance of inspecting and reviewing the requested hiring hall records, and that he could be required to pay only the reasonable cost of photocopying documents he then specifically requested.

---

[2] A copy of this motion, of petitioner's Affidavit in Opposition, and of four subsequent letters referred to in text, have been lodged with the Court.

3. On January 4, 1988, petitioner filed in the court of appeals a motion for clarification of the February 10, 1987 judgment order, asserting that the language of the order permitted it to impose the costs spelled out in its October 27, 1987 letter to Harte, and that "the cost of compliance [with the February 1983 letter request] could very easily reach into the thousands of dollars" (Board Motion, Attachment D at 5). Petitioner requested "clarification" of the February 10, 1987 judgment to the extent of allowing it, *inter alia*, to impose the costs set out in its October 27, 1987 letter "at all aspects of inspection, review, photocopying or duplicating," plus the costs of "[m]onitor[ing] all files while being inspected or reviewed," to require Harte, McMurray, and Clarke to commit in writing to the payment of such costs, and to withhold turning over the requested material until receipt of payment (*id.* at 7). In opposition to this motion, the Board asserted that the enforced order permitted petitioner only to charge for the reasonable cost of duplicating or photocopying records, should the applicants so request (Board Motion, Attachment E at 2, 5-7). On February 11, 1988, the court denied petitioner's motion for clarification, and subsequently denied a request for rehearing (Pet. App. A2; Pet. 11 n.2).

4. By letter dated February 25, 1988 (Board Motion, Attachment G), the Board's Contempt Litigation Branch again asked petitioner to make arrangments with Harte to provide him with the requested information at no cost other than the cost of reproducing specifically requested copies, stating that, if petitioner failed to provide the requested information within a week, it would recommend institution of contempt proceedings.

Petitioner's counsel, by letter dated May 3, 1988, noted that Harte came to petitioner's office on May 2, after several delays to permit petitioner to "collect[], copy[] and collate[]" the requested material (Board Motion, Attach-

ment H). The letter stated that, on arrival at petitioner's offices, Harte had been presented with a bill (for $3,333.22), representing 109 hours of time at carpenter's rates for collecting and copying requested documents, plus $322.95 (representing 15 cents per copied page), and was "advised that the material would not be turned over until the entire [$3,656.17] bill was paid" (*ibid.*). The letter further stated that Harte had offered to pay only $322.95 and that, accordingly, no materials had been turned over to him (*ibid.*).

5. On July 8, 1988, the Board filed a motion for an order adjudicating petitioner in civil contempt of the court of appeals' February 1987 judgment requiring petitioner to provide Harte with the hiring hall information requested in February 1983. The motion papers recited the facts described above, and attached the May 3, 1988 letter from petitioner's counsel stating that no materials had been or would be furnished to Harte unless and until he paid the full amount of the union's bill. The motion further stated that the recited facts were undisputed; that the parties' arguments as to the meaning of the February 10, 1987 judgment had already been placed before the court by petitioner's motion for clarification; that the charges petitioner sought to impose on Harte in May 1988 were the same charges it had sought permission to impose by its motion for clarification, a motion the court had denied three months earlier; and that summary adjudication was appropriate on the existing record (Board Motion at 4-5).

In its opposing papers petitioner admitted that it had not provided the materials specified in Harte's February 1983 request, and repeated its contention that the enforced order was ambiguous and should be read to permit it to impose all costs incurred in honoring requests for hiring hall information (Affidavit in Opp. paras. 3-5).

By order dated August 18, 1988 (Pet. App. A3-A5), the court of appeals ordered that "unless respondent provides the court with evidence showing that the [hiring hall] information [requested by Harte in February 1983] has been made available at no cost other than the reasonable costs of photocopying, the motion [for adjudication in contempt] shall be granted after 30 days from the date of this order." On August 31, 1988, petitioner filed a petition for rehearing or for rehearing en banc, and a motion for a stay of the court's August 18 order pending rehearing or the filing of a petition for certiorari. The petition and motion were denied on September 29, 1988.

6. By letter dated September 14, 1988, petitioner informed Harte that the material that had been duplicated prior to his May 2, 1988 refusal to pay the union's bill for $3,665.95 would be turned over on payment of $322.95 in cash or a certified check. Harte was told that he could "pick up the material [at the union office] on September 21, 1988 at 10:30 a.m." By letter dated September 23, 1988, the Board, in response to the court's request for information as to the status of the case, advised that Harte arrived at petitioner's office at the appointed hour and date, showed a union official that he had the $322.95 with him in cash, and asked to examine the documents before paying for them to determine whether they were the ones he had requested. The letter further reported that after telling Harte he would not be permitted to review the documents before paying for them, the union official removed the documents from the room. Harte then left without receiving any of the requested documents.

By letter dated September 26, 1988, a copy of which was sent to the court of appeals, petitioner's counsel advised the Board that petitioner had complied with the court's August 18, 1988 order by making the documents requested "available at no cost other than the reasonable costs of

photocopying," and that Harte would not "be allowed access to Union office space at no cost to himself so that he may review the thousands of documents at his leisure. It may be that after reviewing the material, he may then refuse to pay for it." By letter dated September 30, 1988, petitioner informed the court that Harte would not be allowed to review the documents in petitioner's offices before paying for them.

7. On October 31, 1988, the court found, on this record, that "[petitioner] has failed to satisfy the Court that it has complied with the judgment of February 10, 1987, and order of August 18, 1988," and accordingly adjudged petitioner "in civil contempt of the judgment of this Court issued on February 10, 1987" (Pet. App. A6). The court ordered (*id.* at A7) that petitioner, its officers, agents and representatives, purge themselves of contempt by fully obeying the court's February 10, 1987 judgment and immediately providing Harte with the hiring hall information requested in February 1983 at no cost other than the reasonable cost of photocopying; by posting notices that it had been adjudged in civil contempt and would immediately undertake purgation; and by mailing at its own expense copies of the posting, including a copy of the contempt adjudication, to all current members and all former members who were members since February 1983. The court further ordered petitioner to reimburse the Board for all costs and expenses of the contempt proceeding, and provided for discovery by the Board to verify compliance (*id.* at A8).

ARGUMENT

1. Petitioner contends (Pet. 17-24) that the contempt adjudication of the court of appeals was improperly based on an ambiguous order. This factbound contention is

without merit. As noted above (p. 3, *supra*), after the court issued its February 10, 1987 judgment enforcing the Board's order, the Board explained to petitioner that, except for photocopying costs, the Board's order did not entitle petitioner to charge Harte for any services involved in meeting his information request. When the court of appeals then denied petitioner's motion for clarification, the court effectively confirmed the Board's position that the terms of the order did not permit the charges in addition to the costs of duplication that petitioner sought permission to impose. In any event, if any doubt remained on that issue, it was removed when the panel considering the Board's contempt petition stated (Pet. App. A5) that petitioner's obligation under the court's judgment was to make the requested information available "at no cost other than the reasonable costs of photocopying," and afforded petitioner 30 days to comply with that requirement. No ambiguity, therefore, could possibly have remained at the time of petitioner's direct defiance of the court's order. Under these circumstances, the court of appeals was fully warranted in finding petitioner in contempt.

2. Petitioner incorrectly contends (Pet. 25-33) that the summary contempt adjudication was inappropriate and that petitioner was improperly denied "an opportunity to present its case before a trier of facts." Contrary to petitioner's contention (Pet. 31) that "[n]ot one Court has found summary adjudication an appropriate vehicle where the conduct complained of did not take place in full view of the Court," the courts of appeals have consistently issued summary adjudications where "admitted matters clearly sustain charges of civil contempt." See, *e.g.*, *West Texas Utilities Co.* v. *NLRB*, 206 F.2d 442, 444 & n.5 (D.C. Cir.), cert. denied, 346 U.S. 855 (1953), and cases cited therein. See also *NLRB* v. *Holyoke Water Power Co.*, 793 F.2d 18 (1st Cir. 1986); *NLRB* v. *Goodsell &*

Vocke, Inc., 645 F.2d 680 (9th Cir. 1981); *NLRB* v. *Hickman Garment Co.*, 471 F.2d 611 (6th Cir. 1972).[3]

Here, petitioner's own counsel, in his letter of May 3, 1988, described petitioner's refusal—and stated its intent to continue to refuse—to permit Harte to inspect the documents he had requested. The sole issue in dispute was whether petitioner's continuing refusal to allow Harte to inspect the records and to charge him only for those he wanted duplicated violated the conditions of the February 1987 judgment.[4] Resolution of that issue did not require

---

[3] The cases cited by petitioner (Pet. 29) for the proposition that summary contempt adjudications for conduct outside the presence of the court are "highly improper" are inapposite. *In re Chaplain*, 621 F.2d 1272, 1275 (4th Cir.), cert. denied, 449 U.S. 834 (1980), and *United States* v. *Sacher*, 182 F.2d 416, 419 (2d Cir. 1950), both upheld summary criminal contempt convictions for conduct committed in the presence of the court; neither case discussed civil contempt proceedings. *Groppi* v. *Leslie*, 404 U.S. 496, 505 (1972), involved a criminal contempt citation by a state legislature.

Nor do the NLRB cases cited by petitioner (Pet. 29 n.10) stand for the proposition that summary proceedings are inappropriate for contempt adjudications. *NLRB* v. *Maine Caterers*, 654 F.2d 131, 132 (1st Cir.), cert. denied, 455 U.S. 940 (1981), is not a contempt matter. *NLRB* v. *FMG Industries*, 820 F.2d 289 (9th Cir. 1987); *NLRB* v. *Gentzler Tool & Die*, 126 L.R.R.M. (BNA) 3318 (6th Cir. 1987); *NLRB* v. *Laborers Fund Corp.*, 124 L.R.R.M. (BNA) 2078 (9th Cir. 1986); and *Florida Steel Corp.* v. *NLRB*, 648 F.2d 233 (5th Cir. 1981), are simply examples of contempt proceedings where there were disputed issues to be resolved, a special master was appointed, and, upon review by the court, a contempt adjudication was issued. None of these cases questions the propriety of summary disposition where no material factual issues are in dispute.

[4] Petitioner's complaint (Pet. 11) that "[t]he Board upon hearsay, accused the Union of acting in bad faith" misses the point. "Since this proceeding is in civil, not criminal, contempt, [petitioner's] intent is not at issue, only its actual compliance with th[e] court's orders." *Florida Steel Corp.* v. *NLRB*, 648 F.2d at 236. See *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

an evidentiary hearing; only the meaning of the court's prior judgment was in question.[5]

[5] There is no merit to petitioner's final contention (Pet. 30) that the requirement that it post and mail the contempt adjudication to its members is punitive rather than remedial. Posting of a contempt adjudication is the standard minimal requirement to insure future compliance, and it is irrelevant that petitioner had posted a previous notice, with which it then failed to comply. Contrary to petitioner's contention (Pet. 31), the court in *Florida Steel Corp.* v. *NLRB*, 648 F.2d at 240-241, ordered that notice of the contempt adjudication be posted; it concluded only that, in the circumstances of that case, additional notice in the form of mailing and reading aloud the court's order to employees was not necessary. The determination of the court below that posting *and* mailing were necessary here merely involved an assessment that, in the circumstances of this particular case, both measures were needed to insure future compliance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

ROSEMARY M. COLLYER
General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board

MARCH 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00175